Hooper Alexander

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 225

SIG SAMUELS, PLAINTIFF IN ERROR,

vs.

J. A. McCURDY, SHERIFF OF DEKALB COUNTY, GEORGIA

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

FILED NOVEMBER [illegible], [illegible]

([illegible])

[illegible] 245 / 304

[illegible] 240

(29,968)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 225

SIG SAMUELS, PLAINTIFF IN ERROR,

vs.

J. A. McCURDY, SHERIFF OF DEKALB COUNTY, GEORGIA

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 5, 1924

[fol. 1] **IN SUPREME COURT OF GEORGIA**

WRIT OF ERROR—Filed November 5, 1923

UNITED STATES OF AMERICA, ss:

[Seal of U. S. District Court, N. D. Georgia]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Sig Samuels and J. A. McCurdy, Esq., Sheriff of Dekalb County in the State of Georgia, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the [fol. 2] United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Sig Samuels, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the United States, the fifth day of November in the year of our Lord one thousand nine hundred and twenty-three.

Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia.

Allowed by Richard B. Russell, Chief Justice of the Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 3] IN SUPREME COURT OF GEORGIA

CITATION—In usual form, showing service on J. A. McCurdy; filed November 5, 1923; omitted in printing

---

[fol. 4] IN SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF ERROR—Filed November 1, 1923

To the Honorable Richard B. Russell, Chief Justice, and to the Honorable the Associate Justices of the Supreme Court of Georgia and to the Honorable the Supreme Court of Georgia:

The petition of Sig Samuels who resides at Decatur in the County of Dekalb in said State, and who is a citizen of said state and of the United States, respectfully shows:

That heretofore, to wit: on the 29th day of September in the year 1922, he presented to the Honorable John B. Hutcheson, Judge of the Superior Court of Dekalb County his duly verified petition against J. A. McCurdy Esq., Sheriff of said county of Dekalb, and a citizen and resident thereof, praying for an injunction and other relief.

In said petition it was alleged that on the 21st day of September, 1922, M. H. Phillips, a deputy sheriff of said county and other persons acting with him, and all acting under the authority of the said sheriff of Dekalb County, came to the residence of petitioner in said county, and claiming to act under a search warrant seized and carried away from said residence, and delivered into the possession of the defendant sheriff, a large quantity of whiskies, wines, beer, cordials, liqueurs, and the like, all as in said petition more fully described, and that said liquors and the like so seized, were then and at that time stored in the jail of said county, and that it was the purpose and intent of the said defendant sheriff to destroy the same summarily and without any hearing from the petitioner, and that said defendant so announces. The value of said liquors were in said petition alleged to be, at the scale of prices current before the prohibition laws, approximately four hundred dollars, but [fol. 5] at the prices usually paid therefor, when illegally sold, much more.

The petition alleged that the greater part of the said liquors were bought by petitioner and kept at his home prior to the year 1907, and the balance thereof were legally purchased by him prior to the year 1915 in the state of Florida, and legally shipped to him in interstate commerce prior to the year 1915. It was further alleged that at the time of said purchases the same were lawful under the laws of both the State of Georgia, and of the United States, and the property so purchased was not intended by him or any other person to be received, possessed, sold, or in any way used, either in

the original package or otherwise, in violation of any law of the State of Georgia, or of any territory or District of the United States, or of any place non-contiguous thereto and subject to the jurisdiction thereof.

The petition further alleged that at all times prior to said purchases, petitioner, was a citizen of the United States and of the State of Georgia, that he was however born in Europe where the use of such liquors is common, that he had been accustomed to their use all his life, that he purchased them lawfully, and not in any way in violation of the laws of the State of Georgia or of the United States, solely for the use of his family and friends at his own home and not for any unlawful purpose.

It further alleged that none of said liquors were ever at any time, after June of 1907, sold or bartered to petitioner within the State of Georgia for a valuable consideration, either directly or indirectly, or otherwise unlawfully procured by him: that none of them were ever given away to induce trade at any place of business or kept or furnished at any other public place, or kept on hand at his place of business, but that all of it that was bought prior to 1907 [fol. 6] was lawfully bought without any violation or evasion of the laws of Georgia, and that none of it that was bought afterwards and before 1915 was bought within the limits of Georgia or in any way unlawfully procured, but that all the first class named was lawfully in his possession prior to the act of August 6, 1907, and all of the second class was lawfully in his possession prior to the 28th day of March, 1917.

It was further alleged that petitioner was a man of temperate habits and had procured the liquors for the use of himself, his family, and his guests, that none of it had ever been sold or used in violation of any law, state or federal, or kept in any unlawful way, or at any unlawful or prohibited place; that petitioner had never sold or in any way illegally dealt with intoxicating liquors of any kind, had never been accused of so doing, and was not then so accused so far as he was advised or believed. It further alleged that petitioner did not know the ground on which the seizure was made, but believed that the officers were acting on the theory that his possession so described was in violation of the first section of the act of the General Assembly of Georgia approved March 28, 1917.

Thereupon petitioner alleged that in so far as said act attempts to make unlawful his possession of said wines and liquors after the same were lawfully bought and lawfully in his possession, the same would be in violation of divers provisions of the Constitution of the State of Georgia, fully cited and set out in said petition, but not necessary or pertinent to this petition.

It thereupon alleged further that any such interpretation of said act of 1917 is and would be in violation of the first paragraph of the tenth section of the first article of the Constitution of the United [fol. 7] States, wherein it is written as follows:

"No state shall pass any bill of attainder or ex post facto law."

for that such an application of said law would constitute it an expost facto law.

It thereupon further alleged that such an interpretation of said act of 1917, so applied, would be in violation of that portion of the fourteenth amendment to the Constitution of the United States on which it is written:

"Nor shall any state deprive any person of property without due process of law."

Thereupon said petitioner further alleged that, in addition to the reasons above set forth as rendering said law of 1917 void as applied to said facts, there is no law of the State of Georgia authorizing a sheriff or other officer to destroy said property without giving petitioner opportunity to be heard, or without the judgment of a court, but that, on the contrary, the act of the General Assembly of Georgia approved November 17, 1915, provides that, even where liquors are unlawfully held or possessed, or kept for unlawful purposes, or are otherwise violative of law, they are to be forfeited to the State when seized, and may be ordered and condemned to be destroyed by order of the court that has acquired jurisdiction of the same, or by order of the Judge or Court after conviction, when such liquors are seized for use as evidence. And the petition alleged that by necessary implication this means that they may not lawfully be destroyed otherwise and without hearing and judgment. And the petition alleged that said law of 1915 was still of force and that no other law of the state of Georgia has provided or could provide for the destruction of said property without hearing and judgment; and that such destruction would be a violation of certain provisions of the Constitution of the United States already set forth herein, which [fol. 8] prohibits any state depriving any person of his property without due process of law.

The petition thereupon prayed for a temporary restraining order to prevent the sheriff from altering the status until a hearing could be had; that a time be fixed for such a hearing, and that at such hearing, a temporary injunction be issued to prevent the destruction of the property until a final hearing before the jury; that at such final hearing on the facts a permanent injunction issue for like purpose; that he have final judgment for the return of the property or for its value; for general relief, for legal process properly directed against the sheriff requiring him to answer; and that an order be passed providing for service on the defendant by the coroner of the county unless the sheriff should see proper to acknowledge service.

The venue of said case was properly laid according to the law of the state, the pleadings and prayers were made according to the laws of Georgia and the practice and usages of the Courts thereof, and the petition was properly presented to said Judge and in proper form, and before filing in Court.

Thereupon, and according to the laws of Georgia and the usages of the Courts of Georgia, said Judge considered and read the petition and endorsed thereon an appropriate order sanctioning the same and ordering that it be filed, granting a temporary restraining order as

prayed, and directing that the matter be heard at a time and place therein named on the question of a temporary injunction; directing also, as prayed, that unless the defendant should acknowledge service and waive process, process should be annexed directed to the Coroner to execute and return, all of which was according to the laws of the state and the usages of its courts. Thereupon, on the same day, to wit, September 29, 1922, the petition was duly filed in the Clerk's [fol. 9] office of said Superior Court, and service was duly acknowledged and process waived by the sheriff, all of which was consistent with and authorized by the laws of Georgia and the usages of its Courts.

Thereafter, on November 10, 1922, the defendant filed his general demurrer to the petition, and on the same day filed an answer wherein he admitted the formal facts alleged and the fact of the seizure, and pleaded that, as to other facts alleged touching the time and circumstances of the purchases and the purpose thereof, and as to the manner and purposes of the uses actually made of the liquors, for want of sufficient information he was unable to answer, either to admit or deny. All these things also were conformable to the laws of Georgia and the usages of her courts.

Thereafter, on November 11, 1922, petitioner filed an amendment to his petition, duly allowed by the Court setting up additional facts not material to the present petition.

Thereafter, on a day in the December Term of the Court, to wit: on December 9, 1922, the matter came on regularly to be heard on the demurrer to the petition and on evidence submitted by petitioner in support of his allegations, and, after hearing the same and the argument of counsel, the Court, on the same day, sustained the demurrer to the petition and ordered the cause dismissed, but allowed a supersedeas for 20 days in order that petitioner might sue out his writ of error to the Supreme Court of the State.

All these proceedings were conformable to the laws of Georgia and the usages of the Courts thereof, and there was no question made or decided as to any matters of practice involved, all of which will more fully and at large appear from the record of the cause now of file in this honorable, the Supreme Court of Georgia.

[fol. 10] Thereafter on the 26th day of September, 1923, this Honorable court filed and handed down an opinion and judgment in the cause, affirming the judgment of the Superior Court dismissing the petition.

And now comes the defendant within the time allowed by the laws of the United States for this purpose, and says that the suit in question and herein described was and is one wherein was drawn in question the validity of a statute of the State of Georgia and of an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and wherein the decision was in favor of their validity, and that said decision was a final judgment in said suit in the highest court of the State of Georgia in which a decision in said suit could be had, and that the same was error. And petitioner presents and tenders herewith his assignments of said alleged errors, and prays that a writ of

error may issue and be allowed to bring up for review before the Supreme Court of the United States the said opinion and judgment of this the Honorable Supreme Court of Georgia to the end that said judgment may be considered and the errors be corrected, and for such other and further relief in the premises as may be legal. And petitioner will ever pray, etc.

Sig Samuels. Hooper Alexander, Petitioner's Attorney, 201 Peters Building, Atlanta, Georgia.

Jurat showing the foregoing was duly sworn to by Sig Samuels, omitted in printing.

[fol. 11] IN SUPREME COURT OF GEORGIA

ORDER ALLOWING PETITION FOR WRIT OF ERROR—Filed November 1, 1923

Upon reading the foregoing application for writ of error and the assignments for error and prayer for reversal presented therewith it is ordered that the same be and it is hereby allowed. Let the petition and assignments of error and the prayer for reversal be filed with the Clerk of the Supreme Court of Georgia for such further proceedings as may be lawful. Upon the giving and filing of bond in the sum of $500.00 conditioned as required by section 1000 of the Revised statutes of the United States which is hereby required, citation will issue.

This 1st day of November, 1923.

Richard B. Russell, Chief Justice Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 12] IN SUPREME COURT OF GEORGIA

SIG SAMUELS, Plaintiff and as Plaintiff in Error,

vs.

J. A. MCCURDY, Sheriff, Defendant and as Defendant in Error

Upon the Petition to Supreme Court of Georgia for Writ of Error

PRAYER FOR REVERSAL AND ORDER THEREON—Filed November 1, 1923

And now comes the said plaintiff in error and, with his petition for writ of error, presents this his prayer for reversal of the judgment of the Supreme Court of Georgia entered on the 26th day of September, 1923, affirming the judgment of the Superior Court of

Dekalb County of December 9, 1922, dismissing the petition which was filed in said Superior Court on the 29th day of September, 1922, praying for an injunction and relief, wherein the said Sig Samuels was plaintiff and the said J. A. McCurdy, Sheriff, was defendant, all which matters are more fully set forth in the petition for writ of error. And he further prays for reversal of the order of said Superior Court dismissing said petition.

Hooper Alexander, Attorney for Plaintiff in Error. 201 Peters Building, Atlanta, Georgia.

Let the above and foregoing prayer for reversal be filed with the Clerk of the Supreme Court of Georgia and transmitted with the writ of error and the transcript of the record to the Supreme Court of the United States.

This 1st day of Nov. 1923.

Richard B. Russell, Chief Justice Supreme Court of Ga.

[File endorsement omitted.]

[fol. 13] IN SUPREME COURT OF GEORGIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 1, 1923

And now comes Sig Samuels who, as plaintiff in error, herewith presents his petition to the Supreme Court of Georgia for a writ of error, and makes and tenders this his assignment of errors to accompany and be filed with his petition for a writ of error to remove to and have reviewed in the Supreme Court of the United States a certain cause above stated, heard and determined in the Supreme Court on the 26th day of September, 1923.

I. The Supreme Court of the State of Georgia erred in affirming the judgment of the Superior Court of Dekalb County dismissing the petition.

II. The Supreme Court of the State of Georgia erred in this, That it should have reversed the judgment of the Superior Court of Dekalb County with direction to grant the temporary injunction prayed for and hold the cause for final trial on the application for permanent injunction and for recovery of the property sued for or its value.

III. The Supreme Court of Georgia erred in this, For that in the petition to the Superior Court of Dekalb County, plaintiff distinctly set up and alleged in the 15th paragraph, that the act of the General Assembly of Georgia, of 1917, as interpreted and applied by the sheriff so as to prohibit and make criminal plaintiff's possession of

the property lawfully acquired by him before said law was enacted, was void as being in violation of the prohibition in the Constitution which forbids any state to pass any ex post facto law; and in the fifth assignment of error in the appellate cause in the Supreme [fol. 14] Court of Georgia, he plainly assigned as error the ruling of the Superior Court dismissing the petition on demurrer, and therein pointed out that said judgment in the Superior Court necessarily denied the right claimed. And now assigning error on his said present petition for writ of error, he says that the judgment of the Supreme Court of Georgia necessarily involves a ruling to the effect that, notwithstanding his lawful acquisition of the property prior to the enactment of said law of Georgia, of 1917, and notwithstanding the lawfulness of his possession thereof at the time of said enactment, the law of Georgia complained of was not and is not an ex post facto law and prohibited as such by the Constitution of the United States. And this ruling by the Supreme Court of Georgia was error.

IV. The Supreme Court of Georgia erred in this, For that, in the sixteenth paragraph of the petition in the Superior Court of Dekalb County, it was plainly set up, and alleged that the act of Georgia of 1917, as construed and applied by the sheriff to prohibit and make criminal his possession of liquors, lawfully acquired by him before said law of 1917 was enacted, would be and was a violation of that part of the fourteenth amendment to the Constitution of the United States which forbids any state to deprive any person of property without due process of law; and the sixth assignment of error in the appellate cause in the Supreme Court of Georgia plainly assigned as error that the ruling of the Superior Court dismissing the petition on demurrer necessarily denied the right claimed. And now assigning error in his said present petition for writ of error, he says that the judgment of the Supreme Court of Georgia affirming the judgment of the Court below necessarily involves a ruling to the effect that, notwithstanding his lawful ownership and possession of the [fol. 15] liquors prior to and at the time of the enactment of said Georgia law of 1917, the State could by law deprive him thereof and make his continued ownership and possession thereof, after said date, a criminal offense and that the act of Georgia of 1917, so providing, was not and would not be a deprivation of property within the meaning of the said clause in said fourteenth amendment. And this ruling by the Supreme Court of Georgia was and is in error.

V. The Supreme Court of Georgia erred in this, For that, in the 17th paragraph of the petition to the Superior Court of Dekalb County it was distinctly set up and alleged that there is and was no law of the State of Georgia authorizing the Sheriff to destroy said property without a hearing accorded to the owner and without the judgment of a court, and the threatened destruction thereof by an officer of the State and under color of his office, without such hearing and judgment, would be and was a violation of that provision of the Constitution of the United States, therein pointed out, which forbids any state to deprive any person of his property without due process of law; and in the eighth assignment of error in the appellate cause

in the Supreme Court of the State of Georgia it was plainly assigned as error that the ruling of the Superior Court dismissing the cause on demurrer necessarily denied the right claimed. And now assigning error in his present petition for writ of error he says that the ruling of the Supreme Court of Georgia affirming the judgment of the Superior Court of Dekalb County necessarily involves a ruling to the effect that the Sheriff could, under said act of 1917 and under the color and authority of his office, lawfully seize and destroy the property without any hearing from the owner and without the judgment of a Court, and such ruling was error because it is and [fol. 16] would be an act of the State depriving him of his property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

Hooper Alexander, Attorney for Plaintiff in Error. 201 Peters Building, Atlanta, Ga.

[File endorsement omitted.]

[fol. 17] IN SUPREME COURT OF GEORGIA

BOND ON WRIT OF ERROR FOR $500—Approved and filed November 5, 1923; omitted in printing

---

[fol. 18] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed November 7, 1923

To the Clerk of the Supreme Court of the State of Georgia:

In preparing the transcript in the above entitled cause and transmitting the same to the Supreme Court of the United States, it is requested that, in addition to and with the writ and citation, you include and forward the following as material to a clear understanding of the errors complained of:

1. The petition for writ of error and the order endorsed thereon by the Chief Justice of the Supreme Court of Georgia.

2. The assignments of error filed therewith.

3. The prayer for reversal.

4. The bond given by the plaintiff in error and approved by the Chief Justice of the Supreme Court of Georgia.

5. The record of file in the Supreme Court of Georgia and on which the judgment complained of was based, the same consisting of the following:

(1) The bill of exceptions and certificate thereon by the Judge of the Superior Court of Dekalb County, upon which the cause was carried before the Supreme Court of Georgia.

(2) The petition upon which the cause originated in the Superior Court of Dekalb County.

(3) The demurrer thereto.

(4) The Answer.

(5) The amendment filed to the petition in the Superior Court [fol. 19] of Dekalb County on November 11th, 1922.

(6) The judgment rendered thereon in Dekalb Superior Court.

(7) All the entries endorsed on said several documents.

6. This præcipe.

7. The opinion and judgment in Supreme Court of Georgia.

Hooper Alexander, Attorney for Plaintiff in Error.

[File endorsement omitted.]

[fol. 20] IN SUPREME COURT OF GEORGIA

3550

JUDGMENT

Atlanta, September 26, 1923.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

SIG SAMUELS

v.

J. A. McCURDY, Sheriff

This case came before this court upon a writ of error from the superior court of Dekalb county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Atkinson, J., dissenting.

[fol. 21] IN SUPREME COURT OF GEORGIA

PER CURIAM OPINION

The plaintiff in error in this case filed his petition to the superior court against the sheriff of Dekalb County, wherein, upon divers

allegations and grounds therein set forth, he prayed for specific recovery of certain personal property, consisting of wines, whisky, beer, and other intoxicating liquors, which it is alleged, he had lawfully acquired in the State of Florida and had shipped to him in this State prior to the year 1915; for an injunction against the destruction thereof; and for general relief. A rule to show cause was granted; also a restraining order to prevent the destruction of the property until the cause could be heard. The defendant filed an answer and a general demurrer to the petition. After amendment of the petition, the hearing on the rule was regularly continued from time to time, until the December term, 1922, when, the cause coming on regularly to be heard, the court heard the demurrer and certain affidavits offered as evidence by the plaintiff, no evidence being offered by the defendant, who elected to stand on the issue of law as made by the demurrer. Thereupon the court sustained the demurrer and dismissed the case. To this judgment the plaintiff excepted. Held, that the court did not err in sustaining the demurrer and dismissing the case. Acts of the General Assembly of Georgia, Extraordinary Session, 1915, p. 77; Act Ex. Sess. 1917, p. 7; De Laney v. Plunkett, 146 Ga. 547; Barbour v. State, 146 Ga. 667; Bunger v. State, 146 Ga. 672.

Judgment affirmed. All the Justices concur, except Atkinson, J., [fol. 22] who dissents on the grounds set forth in the dissenting opinion in the case of De Laney v. Plunkett, supra.

[fol. 23] In the Superior Court of Dekalb County

Bill of Exceptions—Filed in Supreme Court December 26, 1922; in Superior Court December 21, 1922

Be it remembered that, on the 29th day of September 1922, Sig Samuels presented to Honorable John B. Hutcheson, Judge of the Superior Courts of the Stone Mountain Circuit, which includes the county of Dekalb and the superior court thereof, his equitable petition against J. A. McCurdy, Esquire, sheriff of said county, wherein, upon divers allegations and grounds therein fully set forth, he prayed for the specific recovery of certain personal property in the nature of wines, whiskies, beers and other intoxicating liquors, and for an injunction against the destruction thereof and for general relief.

The petition prayed process in terms of the law, returnable at the December term, 1922, of said superior court of Dekalb county, and was in due form of law, and was then and there sanctioned by said judge and ordered to be filed, and it was further ordered that, unless the defendant should acknowledge service and waive process, process should be attached directed to the coroner of said county to execute and return, all of which was conformable to law. In the same order the judge aforesaid included a restraining order to prevent the de-

struction of the property until the cause could be heard, and a rule for the sheriff to show cause at a time and place therein named, why a temporary injunction should not be issued as prayed.

The petition was thereupon duly filed and the defendant acknowledged service and waived process, to wit: on said 29th day of September, 1922.

In due time and appropriate form the defendant filed his general demurrer to the petition, to wit: on the 10th day of November, 1922, and, at the same time, filed an answer.

Thereafter, on the 11th day of November, 1922, plaintiff filed an amendment to his petition by leave of the court, setting up additional grounds for the relief prayed.

[fol. 24] The hearing on the rule was regularly continued from time to time, until said December term, at which term, to wit: on the 9th day of December, 1922, the cause came on regularly to be heard, and was then and there heard before the judge aforesaid in open court.

The demurrer was heard at the same time with certain affidavits offered as evidence by plaintiff, and was treated as applying to the petition and the amendment thereto. The affidavits submitted by plaintiff were sufficient to support the allegations made by his pleadings, and no evidence was offered by defendant, who elected to stand on the issues of law as made by his demurrer.

Thereupon, an order was passed, denying the temporary injunction, and sustaining the demurrer and dismissing the cause, subject, however, to a supersedeas then and there granted in the same order giving plaintiff time in which to sue out his writ of error.

To which judgment and order the plaintiff then and there excepted and now excepts, and assigns the same as error; and, in order more particularly to specify the errors complained of, makes the following particular assignments of error:

Assignment of Errors

First Assignment

Plaintiff says that the case made by his petition and amendment was good in law and was not subject to demurrer, and that the court ought not to have sustained the demurrer thereto, and ought not to have dismissed the cause, but, on the contrary, should have overruled the demurrer and retained the cause on the files, and that the judgment to the contrary was error and is so assigned.

Second Assignment

Plaintiff says that prior to the year 1915, there was no law in Georgia prohobiting entirely the possession of such property, but only [fol. 25] the law of 1907 prohibiting possession thereof at particularly designated places or for particularly designated purposes; that, under the pleadings, he had lawfully acquired the property, and had

never kept or possessed it at any place particularly prohibited, or for any use or purpose particularly prohibited by any law of the State, whether enacted before or after his acquisition, and had never disposed of any of it unlawfully; and that, if any law of Georgia, enacted after he acquired it, was intended to relate back to and affect property so acquired and held, and entirely defeat plaintiff's ownership and possession, without regard to the place or purpose for which the property was possessed, the same would be and was a violation of his rights under the third paragraph of the first section of the 1st article of the constitution of Georgia, which provides that no person shall be deprived of his property except by due process of law. Having properly invoked the protection of this provision of the constitution in his pleadings, he now says that the judgment rendered and now complained of necessarily negatived and denied the right claimed and was, therefore, error, and he assigns it as such.

Third Assignment

For like reasons he says that if any law, enacted by the State of Georgia after he had lawfully acquired a vested title in said property as alleged, was intended to relate back to and prohibit, generally and entirely, his possession of such property, so acquired, the same would be in violation of the first paragraph of the third section of the First Article of the Constitution of Georgia, which provides that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." Having in his pleadings properly invoked this provision, also of the Constitution of Georgia, he now says that the judgment rendered necessarily [fol. 26] negatived and denied the right claimed ans was, therefore, error, and he assigns it as such.

Fourth Assignment

For like reasons, he says, that if any law of the State of Georgia, enacted after his lawful acquisition of a vested title in said property, was intended to relate back to and prohibit, generally and entirely, his possession of such property, so acquired, such law would be in violation of his rights under the second paragraph of the third section of the First Article of the Constitution of Georgia, which provides that "no ex post facto law, or retroactive law shall be passeed." For the laws relied on against him were, as to him and his possession now in question, ex post facto in their criminal features, and retroactive in their civil features. Having properly invoked this provision, also, of the constitution, he now says that the judgment rendered necessarily negatives and denies the right claimed, and was, therefore, error, and he assigns it as such.

Fifth Assignment

Plaintiff says that, prior to the year 1915, there was no law of Georgia prohibiting, generally and entirely, the possession of such

property as is now in controversy, but only the law of 1907 prohibiting its possession at particularly designated places or for particularly designated purposes; that, under the pleadings, he had lawfully acquired the property prior to 1915, title thereto was completely vested in him, and he had never possessed it at any prohibited place or for any prohibited purpose, or disposed of it unlawfully; and that, if the prohibitions as to possession, contained in any law enacted by the State after he had so acquired it, were intended to relate back to and affect his continued ownership and possession, as claimed by the defendant, and make the same a penal offense, without regard to the place at which, or the purpose for which, such possession was [fol. 27] held, such law would, under the facts alleged by plaintiff, violate the first paragraph of the tenth section of the First Article of the Constitution of the United States, which provides that no State shall pass any ex post facto law. Having, in his pleadings, duly and properly invoked the protection of this provision of the Constitution of the United States, he now says that the judgment complained of necessarily negatives and denies this right so claimed, and was and is, therefore, error, and he now, for these reasons, assigns the same as error.

Sixth Assignment

Plaintiff says that, prior to the year 1915, there was no law of Georgia prohibiting, generally and entirely, the possession of such property as is now in question, but only the law of 1907 prohibiting its possession at particularly designated places or for particularly designated purposes; that, under the pleadings, he had lawfully acquired the property prior to 1915, title thereto was completely vested in him, and he had never possessed it at any prohibited place or for any prohibited purpose, or disposed of it in any unlawful manner. In like manner, under the pleadings, he had not at any time possessed it at any particular place or for any particular purpose prohibited by any law enacted prior to the seizure. If, therefore, any law of the State, enacted after his acquisition of it, was intended to relate back to and affect his ownership and possession so acquired and held, or deny him the continued right of ownership and possession without regard to where he kept it or for what purpose, such law would, as to this case, violate and offend against that portion of the 14th amendment to the Constitution of the United States which provides that no State shall deprive any person of his property without due process of law. Having, in his pleadings, duly and properly invoked the protection [fol. 28] of this clause of the Constitution of the United States, he now says that the judgment complained of necessarily negatives and denies this right claimed, and was, therefore, error, and he now, for these reasons, assigns the same as such.

Seventh Assignment

Prior to the year 1915 there was no law of Georgia that was or is claimed to have been violated by plaintiff's acquisition, ownership

or use of the property in question, and plaintiff now says that no law enacted since 1914 was intended to prohibit or interfere with the mere ownership and possession of such property acquired conformably to law prior to 1915. (This does not mean that no such law established a rule of evidence applicable to the possession of such property so acquired, nor does it deny that such laws might and did prohibit such possession at particularly designated places or for particularly designated uses.) In the judgment complained of it was necessarily held otherwise, and, therefore, and on this ground, plaintiff now says that said judgment, in so holding, was error, and is assigned as such.

Eighth Assignment

Plaintiff says that there is no law of the State of Georgia authorizing the sheriff to seize and destroy liquors held and possessed as in the petition alleged, except after process and notice thereof, and a judicial hearing and judgment, and that such *sie*zure as is in the petition alleged, followed by such summary destruction as is therein alleged to have been intended, would be a deprivation of property within the meaning of that portion of the 14th amendment to the Constitution of the United States, which forbids any State to deprive any person of his property without due process of law. The judgment complained of necessarily negatived this claim of plaintiff and is therefore assigned as error.

[fol. 29] Ninth Assignment

Plaintiff says that under the pleadings and undisputed evidence the court should not have denied the temporary injunction and dissolved the restraining order, but, on the contrary, should have granted the temporary injunction prayed for, or passed such other order as was proper in order to preserve the status quo until the case should be heard on the facts and in due course before a jury. In so far as the judgment complained of failed to meet this contention, the same was error and is now assigned as such.

No part of the evidence needs to be sent up further than the statement already herein made relative thereto. Plaintiff specifies as material to the error complained of the following portions of the record:

1. The original petition.
2. The amendment of November 11, 1922.
3. The defendant's demurrer.
4. The defendant's answer.
5. The final judgment.

And now, at said December term, 1922, of said court, and before the adjournment thereof, and within the time allowed by law, the

plaintiff comes and tenders this his bill of exceptions, and prays that the same be signed and certified and transmitted to the Supreme Court of Georgia, as provided by law, together with a transcript of such portions of the record as are herein specified as material to a consideration of the errors alleged to have been committed, to the end that the errors so alleged may be considered and corrected.

Alexander & Meyerhardt, Branch & Howard, Attorneys for Plaintiff in error.

Post Office Address: Atlanta, Ga.

[fol. 30] IN THE SUPERIOR COURT, DEKALB COUNTY

ORDER SETTING BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions is true, and specifies all the evidence necessary to be considered, and specifies all of the record material to a clear understanding of the errors complained of; and the clerk of the superior court of Dekalb county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certified the same as such, and cause the same to be transmitted to the present term of the Supreme Court of Georgia as provided by law, that the errors alleged to have been committed may be considered and corrected.

This 16 day of December, 1922.

John B. Hutcheson, J. S. C., Stone Mountain Circuit.

Due and legal service is hereby acknowledged on the within and foregoing bill of exceptions, copy received, and all other and further service and notice are hereby waived.

This 16 day of December, 1922.

Alonzo M. Brand, Attorney for Defendant in Error, Solicitor General St. Mt. Ct.

Lithonia, Ga.

SUPERIOR COURT DEKALB COUNTY

CLERK'S CERTIFICATE

Clerk's Office, Superior Court of Dekalb County

Decatur, Ga., December 22, 1922.

I hereby certify that the foregoing is the true original bill of exceptions, filed in this office, in the case therein stated; and that a copy thereof has been made and is now of file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year last above written.

B. F. Burgess, Clerk. (Seal.)

[fol. 31] [File endorsement omitted.]

[fol. 32] IN THE SUPERIOR COURT, DEKALB COUNTY

PETITION

To the Superior Court of said county:

The petition of Sig Samuels shows as follows:

1. On the 21st day of September, 1922, M. H. Phillips, of said county, a deputy sheriff or constable, in company with other persons acting under his authority, all of whom were acting generally under the authority of the sheriff of said county, came to the house where petitioner lives with his family and makes his home, at Number 245 East Lake Road, in the town of Decatur and county of Dekalb, and proceeded to search the premises.

2. Said Phillips and his companions claimed to be acting under authority of a search warrant, and, so far as petitioner knows, this was true, though petitioner does not at this time know with certainty whether the same was regular and valid or not. No question is here made on said warrant, though petitioner reserves the right by amendment so to do, should it hereafter appear proper and material to take such course or make such issue.

3. At the conclusion of said search, the said Phillips and his companions seized and carried away and delivered to the possession of J. A. McCurdy, Esquire, sheriff of said county, a large quantity of whiskies of various kinds, gin, rum, brandy, various kinds of wines, sherry, port, claret, Sauterne, Burgundy, Champagne, Rhine wines and others, also various liquors, such as apricot brandy, creme de menthe, maraschino, blackberry cordial, creme de rose, creme de coco, Kimmel and the like together with eight casks of beer in bottles, all of which were taken from petitioner's house at the time of said search.

4. Said parties delivered the spirituous and vinous and malt liquors to the sheriff as aforesaid, and the same are now stored at the jail in Decatur in said county, and petitioner is informed and [fol. 33] believes that it is the purpose and intention of the said J. A. McCurdy to destroy said liquors summarily and without any hearing from your petitioner, and the said McCurdy so announces.

5. Said liquors are difficult to value because the same are not at this time legally salable in Georgia or within the United States. At prices current prior to the prohibition laws, State and National, the

same were worth approximately four hundred dollars. At the prices generally paid for such goods at the present time when illegally sold, they are worth considerably more than the amount stated.

6. By far the greater part of said liquors were bought and came into the possession of petitioner, and were kept by him, at his home prior to the year 1907.

7. The balance of said liquors were legally purchased by petitioner in the State of Florida prior to the year 1915, and were legally shipped in interstate commerce to your petitioner prior to the year 1915, and were taken to and stored at his home. At the time of said purchase, the same was absolutely lawful under the laws of the State and of the United States, and said property so shipped and transported to your petitioner in interstate commerce from the State of Florida was not intended by petitioner or by any other person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the State of Georgia or of any territory, or district of the United States, or place noncontiguous thereto, and subject to the jurisdiction thereof.

8. Your petitioner was at all times prior to the purchase of said liquors a citizen of the United States and of the State of Georgia, but was born in Europe, where the use of such spirituous, vinous, and malt liquors is exceedingly common, and where practically every-
[fol. 34] body drinks them *them* regularly and in moderation. Petitioner has been accustomed to the use of such liquors all his life, and purchased said liquors lawfully and not in any way whatever in violation of the laws of Georgia or of the United States, for his own use and the use of his family and friends at his own home and not for any unlawful purpose whatsoever.

9. None of said liquors so bought as aforesaid were ever at any time after June of 1907 sold or bartered to your petitioner within this state for a valuable consideration, either directly or indirectly, or otherwise unlawfully procured by your petitioner; none of said liquors was over given away to induce trade at any place of business or kept or furnished at any other public place, or manufactured by petitioner, or kept on hand at his place of business, but all of it that was bought prior to the year 1907 was lawfully bought without any violation or evasion of the laws of Georgia. None of it that was bought after 1907, and prior to 1915 as alleged, was bought within the limits of the State of Georgia, or in any way unlawfully procured, but all of that part of the liquor which was bought prior to 1907, was lawfully in your petitioner's possession in that year and prior to the passage of the act of August 6, 1907; and all that part of it which was bought after 1907 and prior to 1915 was lawfully bought in violation of no law whatever, State or federal, and was lawfully in the possession of your petitioner prior to the 28th day of March, 1917.

10. Your petitioner is a man of temperate habits, who procured said liquors for the use of himself, his family and his guests. None of it has ever been sold or in any way used in violation of the laws of Georgia or of the United States, and none of it has been kept in any unlawful way or at any unlawful or prohibited place. Your petitioner has never sold or in any way illegally dealt with intoxicating liquors of any kind, and has never been accused of so doing, [fol. 35] and is not now so accused, so far as he is advised and believes.

11. Your petitioner does not know on what ground or basis said liquors have been seized, or on what theory, but your petitioner believes that the officers seizing the same acted and are acting upon the theory that petitioner's possession of said liquors at his home for his own use and for family use is a violation of the first section of the Act of the General Assembly of Georgia approved March 28, 1917.

12. And petitioner respectfully shows that such is not the case, and that in so far as said act undertakes to make unlawful his possession of said wines and liquors after the same were legally bought and legally in his possession it is and would be a violation of the third paragraph of the first section of the first article of the Constitution of the State of Georgia, wherein it is written as follows:

"No person shall be deprived of his property except by due process of law."

13. And such construction further is and would be a violation of the second sentence of the first paragraph of the third section of the first article of the Constitution of Georgia, wherein it is written as follows:

"Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."

14. And said law of 1917 so construed is and would be in like manner a violation of the second paragraph of the third section of the first article of the Constitution of Georgia, wherein it is written as follows:

"No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts or making irrevocable grants of special privileges or immunities shall be passed."

[fol. 36] For that such an interpretation and application of said law would make it not only a retroactive law but also an ex post facto law.

15. And petitioner further shows that such an interpretation of said act of 1917 applied to the facts hereinbefore stated is and would be a violation of the first paragraph of the tenth section of the first article of the Constitution of the United States, wherein it is written as follows:

"No State shall pass any bill of attainder or ex post facto law."

For that such an application of said law would constitute it an ex post facto law.

16. And petitioner further shows that such an interpretation of said act of 1917 so applied is and would be a violation of that portion of the fourteenth amendment to the Constitution of the United States in which it is written as follows:

"Nor shall any State deprive any person of property without due process of law."

17. And petitioner further shows that not only is it true that said law, as now applied or sought to be applied to the facts stated and to said property, is void for the reasons hereinbefore given in paragraphs twelve to sixteen, both inclusive; but in addition thereto there is no law of the State of Georgia which will justify the sheriff or any other officer or person in destroying said property without giving petitioner an opportunity to be heard or without the judgment of a court. On the contrary, the twentieth section of the act of the General Assembly of Georgia approved November 17, 1915, provides that even where such liquors are unlawfully held or possessed or kept for unlawful purposes, or are otherwise violative of law, they are to be forfeited to the State when seized, and may be ordered and [fol. 37] condemned to be destroyed after seizure by order of the court that has acquired jurisdiction of the same, or by order of the judge or court after conviction, when such liquors and such property named have been seized for use as evidence. And petitioner says that by necessary implication this provision means that such liquors shall not be destroyed otherwise and without hearing and judgment. And petitioner says that said law is of force, and that no other law of the State of Georgia has provided for the destruction of such property or could do so, and that the destruction of said property without hearing or judgment would be a violation of the provisions hereinbefore quoted in paragraph twelve hereof from the Constitution of Georgia which forbids a citizen to be deprived of his property without due process of law, and in like manner such destruction without notice, hearing and judgment of the court would be a violation of that section of the Constitution of the United States hereinbefore quoted in paragraph sixteen hereof wherein it is provided that no State shall deprive any person of his property without due process of law.

Wherefore your petitioner prays:

1st. That a temporary restraining order be issued now, directed to J. A. McCurdy, Esquire, sheriff of said county of DeKalb, restraining him from destroying said property or altering the status thereof until a hearing can be had, on a day and at a place in said order to be fixed by the court.

2nd. That upon said hearing a temporary injunction issue, enjoining and forbidding the said McCurdy to destroy or affect the status of said property until a final hearing can be had before a jury.

3rd. That at the final hearing upon the facts before a jury, he be granted a permanent injunction against the said McCurdy, enjoining and forbidding him or any other person at any time to destroy said property or affect the status thereof.

[fol. 38] 4th. That the court inquire and determine, with the aid of a jury, as to the truth of these facts, and that it be adjudged that said property is the property of this petitioner, lawfully and rightfully obtained, and that his possession thereof is lawful, and that he have judgment for the return thereof, or for the value thereof, as may be proper.

5th. That petitioner be awarded such other and further relief and judgment as may be lawful and equitable in the premises, whether specifically herein prayed or not.

6th. That process may issue against the said J. C. McCurdy, Esquire, sheriff as aforesaid, requiring him to appear and answer at the next term of the superior court of said county and abide the judgment and decree of the court in the premises.

7th. That an order be passed at this time directing that, unless the said McCurdy shall see proper to acknowledge service hereon, the coroner of said county be directed to serve same and said process.

Branch & Howard, Alexander & Meyerhardt, for Plf.

Jurat showing the foregoing was duly sworn to by Sig. Samuels, omitted in printing.

[fol. 39] IN SUPERIOR COURT, DEKALB COUNTY

TEMPORARY RESTRAINING ORDER AND ORDERS TO SHOW CAUSE
Filed September 29, 1922

Upon reading and considering the above and foregoing petition, the same is sanctioned, and it is ordered that it be filed as usual with the clerk. Let a copy be made of this order and served on the said J. A. McCurdy, and let the said McCurdy be now restrained from destroying the property alleged and described in said petition, or alterating the status thereof, until a hearing can be had on said petition. Let the said McCurdy thereupon show cause before me at 10 o'clock a. m. on the 28 day of Sept. 1922, at the court house in Decatur why the temporary injunction should not issue as prayed. Let process be issued and attached as usual, and unless the said McCurdy shall see proper to acknowledge service and waive process—let said process be directed to the corner of said county, and let the coroner serve the same as provided by law.

This 29th day of September, 1922.

John B. Hutcheson, J. S. C., St. Mt. C.

[File endorsement omitted]

Due and legal service acknowledged of the within petition and order, and copy waived, as well as process and copy process. This Sept. 29, 1922.

J. A. McCurdy, Sheriff.

In Superior Court, Dekalb County

[Title omitted]

Amendment to Petition—Filed November 11, 1922

Now at the hearing on said petition and rule, the hearing having been regularly adjourned from time to time and the cause now coming on to be heard, the petitioner comes and amends his petition and alleges as matter of law that neither the prohibitions as to possession contained in the law of 1915 nor those in the law of 1917 referred or were intended to refer to such liquors as were already [fol. 40] lawfully in the possession of a citizen, nor to require the owners thereof to destroy the same. On the contrary petitioner avers that both said laws were intended to and did refer to such wines, beers or other alcoholic liquors as should be acquire- subsequently to said respective acts.

Branch & Howard, Alexander Meyerhardt, Petitioner's Attorneys.

Above amendment allowed.
This Nov. 11th, 1922.

John B. Hutcheson.

Due and legal service acknowledged on the above and foregoing amendment.
This Nov. 11, 1922.

Alonzo M. Brand, Sol. Gen.

[File endorsement omitted.]

Superior Court, Dekalb County

[Title omitted]

Demurrer—Filed November 10, 1922

And now comes the defendant in the above stated case and without waiving his right to plea and answer files this his general demurrer and for cause of demurrer says:

(1) That the allegations of plaintiff's petition does not set out a cause of action against this defendant, and the allegations therein contained does not set out a cause of action for the interference of a court of equity.

(2) That the allegations therein contained are contrary to the statutes of the State of Georgia, as made and provided by the act of the legislator known as the prohibition law and approved March 28, [fol. 41] 1917, and for that reason said bill should be dismissed.

Wherefore defendant prays that these his grounds of general demurrer be inquired of by the court and that the same be sustained.

Alonzo M. Brand, Solicitor General of the Stone Mt. Ct.,
Defendant's Attorney.

[File endorsement omitted.]

IN SUPERIOR COURT, DEKALB COUNTY

[Title omitted]

ANSWER—Filed November 10, 1922

Now comes the defendant in the above stated case and without waiving his right to demurrer heretofore filed, files this his plea and answer and for plea and answer says:

(1) Your defendant admits paragraphs (1), (2), (3), and (4) of plaintiff's petition.

(2) Your defendant denies paragraphs (5) of plaintiff's petition and says that liquors are contrabond and of *not* value and *is* not property in the State of Georgia.

(3) Your defendant can neither admit or deny for want of sufficient information paragraphs (6), (7), (8), (9) and (10) of plaintiff's petition.

(4) Your defendant in answer to paragraph 11 of plaintiff's petition says that the seizure of the liquor was in accordance to the act of the general assembly approved March 28th, 1917, known as an amendment to the prohibition laws of Georgia.

(5) Your defendant denies paragraphs (12), (13), (14), (15), (16) and (17) of plaintiffs petition and says that in no instance does his act or the act of the officers violate the constitution of Geor- [fol. 42] gia or the constitution of the United States, nor is it necessary for any order of court for the purpose of destroying the liquor, because there is no property in liquors by the laws of Georgia.

Wherefore defendant prays that he be discharged.

Alonzo M. Brand, Sol. Gen. St. Mt. Ct., Def't's Attorney.

IN SUPERIOR COURT, DEKALB COUNTY

Jurat showing the foregoing was duly sworn to by G. A. McCurdy omitted in printing.

[File endorsement omitted.]

IN SUPERIOR COURT, DEKALB COUNTY

[Title omitted]

ORDER OVERRULING PETITION FOR TEMPORARY INJUNCTION

The above entitled cause came on this day to be heard and was heard upon the petition as amended and upon the demurrer of the respondent thereto and upon the affidavits offered as evidence in said cause, and thereupon it is considered, ordered and adjudged by the court that the temporary injunction prayed for be denied, and that the restraining order heretofore granted be and the same is [fol. 43] hereby dissolved. It is further considered, ordered and adjudged that the general demurrer filed by the defendant be and the same is hereby sustained, and the cause dismissed subject to a supersedeas as hereinafter stated.

That is to say, petitioner having indicated his purpose to sue out a writ of error to the Supreme Court, it is further ordered that a supersedeas be granted in the cause, and that the restraining order remain of force for the period of twenty days from this date. The sheriff shall retain possession of the whisky in controversy.

In open court, this 9th day of December, 1922.

John B. Hutcheson, J. S. C., St. Mt. C.

SUPERIOR COURT, DEKALB COUNTY

CLERK'S CERTIFICATE

December 22, 1922.

I hereby certify that the foregoing pages hereto attached contain a true and complete transcript of such parts of the record in the case therein stated as are in the bill of exceptions specified.

Witness my signature and the seal of said court hereto affixed, the day and year first above written.

B. F. Burgess, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 44] IN SUPREME COURT OF GEORGIA

CLERK'S CERTIFICATE

November 13, 1923.

I hereby certify that the foregoing pages hereto attached contain the original writ of error, and the original citation, together with true and complete copies of the parts of the record specified in the præcipe in the case of Sig Samuels, Plaintiff in Error, vs. J. A. McCurdy, sheriff, Defendant in Error, as apears from the records and files of the Supreme Court of Georgia now in this office.

Witness my signature and the seal of the Supreme Court of the State of Georgia hereto affixed the day and year first above written.

Z. D. Harrison, Clerk Supreme Court of Georgia. [Seal Supreme Court of the State of Georgia.]

Endorsed on cover: File No. 29,968. Georgia Supreme Court. Term No. 658. Sig Samuels, plaintiff in error, vs. J. A. McCurdy, sheriff of Dekalb county, Georgia. Filed November 22, 1923. File No. 29,968.

(3162)

INDEX TO BRIEF

IN THE

Supreme Court of the United States

No. 225

OCTOBER TERM 1924

SIG SAMUELS, Plaintiff in Error,

vs.

J. A. McCURDY, Sheriff, Etc.,
Defendant in Error

ARGUMENT AND BRIEF
For
Plaintiff in Error

I.

STATEMENT OF THE CASE.

1. What It Is Not.

This is not a case in which there has been an attempt to deal illegally in intoxicating liquors. It is not a case in which the plaintiff has even been suspected of so doing. It is not a case in which there

has been any violation or evasion of any law, state or federal, against such dealings.

2. What It Is.

This is a case in which a citizen, bought wines and liquors through a series of years, while it was lawful to do so, and without violating any law, and stored them in his own cellar for the sole use of himself, his family, and his guests, as it was at the time perfectly lawful to do. He alleges in his petition to the trial court that he has never even been suspected of dealing in them **(transcript, page 19, paragraph 10)**, and the trial judge certifies that the evidence submitted at the hearing sustained all the allegations made. **(See transcript, page 12, 5th paragraph, and judge's certificate page 16.)**

In the year 1917, and more than two years after the last purchase was made, the legislature of Georgia for the first time prohibited generally the possession of such liquors. In 1922 the Sheriff of DeKalb County, in which county plaintiff resided, went to his residence and seized the property and carried it away, declaring a purpose to destroy it; whereupon plaintiff in error brought his petition in the Superior Court of that County to recover the property and for an injunction against its destruction.

There was a demurrer and an answer in general terms; and, according to the usual Georgia practice,

there was a summary interlocutory hearing for a temporary injunction, at which the parties may offer evidence, and the plaintiffs must do so notwithstanding the demurrer. The plaintiff submitted his evidence. The sheriff offered none. Thereupon the Court sustained the demurrer and dismissed the petition, not on any technical ground or insufficiency in the allegations, but on the very right of the cause. **(transcript, page 24.)**

The case was thereupon carried to the Supreme Court of Georgia on a bill of exceptions, the certificate to which, under the Georgia law, is the writ of error.

(For Bill of Exceptions see transcript, page 11 et seq. For Certificate, page 16. For Georgia Law see Code 1910, sections 6145 and 6146.)

The Supreme Court of Georgia by a divided bench affirmed the judgment and the present writ was sued out. (156 Ga., 488.)

The resulting issue is thus sharply defined. While error is formally assigned in several respects, the controlling question is this:

When a citizen has lawfully acquired property which is and has long been recognized as legitimate, and which, at the time of the acquisition, it is lawful to acquire and possess, and is not using it for any unlawful purpose or keeping it in any unlawful manner, can the state by statute make its ownership

and possession unlawful and thereby compel its destruction without judicial procedure and without compensation?

It is therefore suggested that the question now to be determined is not one peculiar to intoxicating liquors and that the decision to be rendered ought not to be classified or indexed under that title but as a matter of Constitutional Law involving fundamentals.

II.

SPECIFICATION OF THE ERRORS RELIED ON.

There were nine assignments in the Supreme Court of Georgia. Some of these involved questions growing out of the State constitution only. There are five assignments of error in the present cause based on the Federal Constitution.

1.

The first assignment here **(transcript page 7)**, is that the Supreme Court of Georgia erred in affirming the judgment of the trial court.

We think that this reaches out and envelops all the merits of the cause. The original petition alleged in paragraph 15 thereof **(transcript, page 19)**, that the Georgia act of 1917 prohibiting the possession, as interpreted by the Sheriff, violated the federal prohibition against **ex post facto legislation**; and, in paragraph 16 **(transcript, page 20)**, that it violated the prohibition of the 14th amendment against deprivation of property without due process.

So, in paragraph 17 **(transcript, page 20)**, it was specially complained that there was no law in Georgia under which the Sheriff could seize and destroy property merely on his own judgment and without process and hearing, and that his so doing would be a violation of the same prohibition in the 14th amendment.

The first assignment of error in the State Supreme Court **(transcript, page 12)**, was undoubtedly sufficient to envelop and make available, on error in that Court, each and all the grounds of complaint above referred to, as set out in paragraphs 15, 16 and 17 of the original pleadings. **(Frierson vs. Alexander,** 74 Ga., 666, (1). This principle is referred to here not because there was any question made about it in the State Court, but merely to explain that such is the Georgia practice.

Because the first assignment in the State Court was thus sufficient to raise in that Court all the issues here to be argued, and because the State Court did not sustain it, it is thought that the first assignment here is likewise sufficient to raise all the questions in this Court. Nevertheless, for the sake of certainty, the particular questions involved have been made here by particular assignments.

2.

The second assignment here **(transcript, page 7)**, is subject to the same observations as above. It does not differ very seriously from the first, complaining merely that the Supreme Court of Georgia should have reversed the judgment below and should have directed that the petition be retained and a temporary injunction granted.

3.

The third assignment here **(transcript, page 7)**, deals with a particular and specific ground of error.

It raises this issue of law,—that when plaintiff had lawfully acquired the property, and was lawfully in possession of it prior to 1917, the law of that year making its mere possession a penal offense was necessarily as **ex post facto** law, and prohibited as such by the Federal Constitution. The judgment of the Supreme Court of Georgia necessarily negatived this proposition.

Counsel for plaintiff in error is not unaware of the fine line of distinction over which he is here in danger of trespassing, but he believes the assignment good. Perhaps it is not necessary for plaintiff in error to fall back on this defense, but he believes it is a sound proposition in law, and on this idea,—that where an existing condition arose lawfully, and a subsequent statute denounces its passive existence or continuance, the statute is just as much **ex post facto** as would be one that penalized the prior active accomplishment out of which the condition arose. It is thought that this is especially true where the only possible way to avoid the passive continuance of the originally lawful condition would involve the uncompensated surrender or destruction of property which could be taken away only by force of the very statute in controversy.

The legal proposition is a nice one, even though the point be elusive. The passive state denounced by the act is not analogous to a case in which the subsequent statute commands a positive act and penalizes the refusal to obey, nor to one in which the subse-

quent statute prohibits some affirmative act. In the instant case the thing prohibited is not an act but a condition, a **status quo.** The status grew out of the originally lawful act. The issue tendered here is that to prohibit and penalize the existing status is as much **ex post facto** as to penalize the prior act which produced it.

4.

The fourth assignment here **(transcript, page 8)**, proposes that the Supreme Court of Georgia, in affirming the judgment below, necessarily ruled that, although the possession denounced by the Georgia act of 1917 grew out of a lawful acquisition prior to that year, the destruction of the liquor was not a deprivation of property within the meaning of the fourteenth amendment.

In considering this assignment it will be borne in mind that the 16th paragraph of the original petition **(transcript, page 20)**, distinctly tendered the issue that the law of 1917 prohibiting such possession, as interpreted by the Sheriff, violated the 14th amendment by depriving the plaintiff of his property without due process, and that the 6th assignment in the Supreme Court of Georgia **(transcript, page 14)**, set up that the judgment of the trial court necessarily negatived the proposition.

5.

The fifth assignment here **(transcript, page 8)**,

raises the due process question from a somewhat different angle. It seems impossible to deny its force. The Sheriff had seized and was proposing to destroy the property on his own judgment only and without warrant. The 17th paragraph of the original petition (**transcript, page 20**), alleged that even though the possession was unlawful, the seizure and destruction was not legally possible without a judicial hearing and a judgment of forfeiture, and that such was the mandate of a valid statute then in force. The 8th assignment in the Supreme Court of Georgia complained that the judgment of the trial court had necessarily held it possible for the Sheriff to do this.

It will be observed that this specification is wholly independent of any question as to the invalidity of the law of 1917 itself. And it is important. For it is conceivable that cases might arise in which plaintiff could not avail himself of the invalidity of the statute because of some extrinsic fact based on technical grounds. In such case plaintiff would be advised thereof if a proceeding to condemn or forfeit his property were lawfully instituted and he had his day in court. Thus, suppose the seizure proceeded on some belief in the mind of the Sheriff that plaintiff was selling or intending to sell, or some accusation of that sort. If allowed notice and a hearing, he would defend with the lights before him, whereas, in the instant case, he must appear as **actor** to set up his rights and in the dark. The issue here tendered proceeds upon the idea that the law of the state in

any event guarantees him a hearing, and can not deny it, and that his property can not be destroyed except upon the judgment of a court, after notice given, instead of on the **ex parte** judgment of a ministerial officer, secretly formed.

We have endeavored in the foregoing statement to clearly present the issues that are to be determined. Possibly the statement has been needlessly explicit, but we have been anxious to comply with the requirements of rule 21. We would gladly leave the question right there, for we think that the issues argue themselves, and that on such a question as this the utmost counsel can do to aid the Court is to clearly formulate the issues. The rules, however, contemplate an argument, and indeed it is perhaps a necessary duty that we collect the statutes directly or indirectly bearing upon the subject, and lay them before the Court as the premises of the argument.

III.

RELEVANT LEGISLATIVE HISTORY.

1. The Georgia Law of 1907.

The beginning of the Georgia policy on the subject is contained in the session Laws of Georgia for 1907, page 71, now embraced in Section 426 of the Penal Code as follows:

> "It shall not be lawful for any person within the limits of this State to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or keep or furnish at any other public place, or manufacture, or keep on hand at their place of business any alcoholic, spirituous, malt or intoxicating liquors, or intoxicating bitters, or other drinks which if drunk to excess will produce intoxication; and any person so offending shall be guilty of a misdemenaor."

Nothing contained in this act affected plaintiff's continued right to own and possess the liquors in controversy, the greater part of which were acquired prior to that date **(transcript, page 18, Par. 6)**. Indeed the specific prohibitions contained in it were a tacit permission for him so to continue. Not all the liquors were purchased prior to 1907, but the balance were purchased lawfully and shipped to him in interstate commerce prior to 1915 **(transcript, page 18, Par. 7)**.

2. The Webb-Kenyon Act.

In 1913, Congress passed the law, approved March 1, 1913, known as the Webb-Kenyon Act (37 Stat. L. 699; 4. Fed. Stat. Ann. 593). The peculiar provisions of this law are well enough known to need no comment further than to say that it contains nothing that could or did operate to affect the legality of the liquors then in plaintiff's possession or any that came to him in the course of interstate commerce between the date of its enactment and the year 1915. None of it was, within that period, either received, possessed, sold, or used by him in violation of any law of the State of Georgia; and it will hardly be claimed that the Webb-Kenyon Act was self operative to affect interstate commerce. Legislation was undoubtedly necessary on the part of the State before the Act could have that result.

3. The Georgia Legislation of 1915.

In 1915 the State did so legislate. None of the liquors involved in the present case were bought after that legislation. It is important, however, as part of the history of the matter, and because of its express and implied declarations as to the public policy of the State.

There was an extra session of the Georgia Assembly called in that year

> "To consider broadly the question of prohibition, with the view to making such additions to,

or changes in the present laws, as will, in the opinion of the General Assembly, secure uniform and adequate enforcement of the same, and prohibit the sale and manufacture of alcoholic, spirituous, malt, or intoxicating liquors within the bounds of the State of Georgia." **(Acts of 1915, Extra Session, Page 7.)**

Four laws were passed by the General Assembly at the session so convened, on the general subject of alcoholic liquors, and their prohibition. The first and fourth of these are not here material in any way to the present discussion. The first merely repealed certain taxes on the manufacture, sale, storage, and distribution of substitutes for intoxicants, and certain other taxes on locker clubs. The fourth prohibited advertising intoxicating liquors or taking or soliciting orders therefor. **(Acts of 1915, Extra Session, Pages 76 to 107 inclusive.)**

The second of the series was approved November 17th, 1915, and will be hereinafter referred to as the Act of November 17th, 1915, **(Ib., page 77)**. It did not, in principle, substantially change the Act of 1907, but merely added many details for the avowed purpose **"to make clearer and more certain"** the prohibition laws **"heretofore enacted" "and particularly"** the act of 1907. The title of the Act was carefully drawn as a complete summary of the law, doubtless for the purpose of avoiding any possibility of its violating the Constitutional provision against the enactment of any law which **"contains matter different from what is expressed in the title thereof."**

In order certainly to comply with subdivision 3 of Rule 21 I present in an Appendix "A," page 42 of this brief, a summary of all the sections of this Act. Only Sections 2, 7, 8, and 20 seems to be material and these I have set out in the appendix more fully.

The title to the Act of November 18th **(Ib., page 90)**, like the other was a complete summary of the Act, and doubtless for the same reason. It will be herein referred to as the Act of Nov. 18, 1915.

It was manifestly passed for the purpose of exercising the authority supposed to result from the Webb-Kenyon Act, and preventing interstate shipments of intoxicants.

For all practical purposes these two Acts of November 17th and 18th are to be considered as one Act. They were divided into two for purely local reasons growing out of certain requirements of the Georgia Constitution on the subject of the methods of legislation. The Act of Nov. 18th is also fully synopsized in an Appendix "B," page 46 of this brief, somewhat fuller treatment being there given to Sections 1, 6, 7, 8, 17 and 18 because they throw light on what was up to and at that time the public policy of the State, Section 6 being indeed a most express declaration thereof.

Speaking generally of these two Acts it may be said that the first was largely a matter of detailed provisions for more rigid enforcement of the Act of

1907. It expressly disclaimed, in Sections 2, 7 and 8, any purpose to interfere with the social serving of drinks in private residences in ordinary social intercourse, and Section 20 expressly required the judgment of a court before the liquors could be destroyed.

Of the second Act is may be observed that it was manifestly passed for the purpose of exercising the authority that resulted, or was supposed to result from the provisions of the Webb-Kenyon Act. Section 1 expressly recognized the right to import from other States or countries in limited quantities, and where the use or possession was not intended to be in violation of law, and Section 6 was an express declaration of the public policy as recognizing the right of individuals to possess such liquors at home. Section 8 was an implied recognition of the same right, and the latter parts of Section 16 and 17 were even clearer on that subject.

None of the liquors now involved were bought after the passage of these Acts. They were all in possession when and before these laws were passed, and lawfully in possession, and the Acts referred to are material here only because they constitute a legislative admission and declaration that everything done by plaintiff in error up to that time was lawful and perfectly consistent with the public policy of the State.

4. The Reed Amendment.

The next legislative enactment bearing in any way on the subject was what is known as the Reed

Amendment, and it is not specially relevant, but it is referred to here largely as a part of the evolution of American public policy on the subject.

In the Act of Congress making appropriations for the support of the Post Office Department, approved March 3, 1917, there was included what was known as the Reed Amendment, prohibiting such shipments, except for certain purposes, into any state which by law forbids the manufacture or sale. **(Fed. Stat. Ann. Sup. 1918, page 395.)**

5. The Georgia Law of 1917.

The legislation of 1915 did not prove satisfactory. The Act of November 18, 1915, was particularly disappointing. This was the Act passed to make effective in Georgia the provisions of the Webb-Kenyon Act by regulating interstate shipments to Georgia. In 1916 **(Georgia Laws of 1916, page 134)**, an attempt had been made to provide more stringent rules on this subject, though that Act is not material here. and was repealed in 1917. In 1917 there was another extra session called on the subject. At this session the law was passed under which the present controversy arises. It prohibited all transportation or delivery, interstate as well as local, and prohibited possession also, this prohibition being contained in the 1st section, reading as follows:

> "It shall be unlawful for any . . . person to receive from any common carrier . . . or to have, control, or **possess** in this State any of said

enumerated liquors or beverages, **whether intended for personal use or otherwise,** save as is hereinafter excepted." (Acts of 1917, Extra Session, page 8.)

It also provided for seizures, condemnation and sale, and expressly repealed the entire Act of November 18th, 1915, which put into effect the authority deduced from the Webb-Kenyon Act, as well as its supplement of 1916 and some parts of the Act of November 17th, 1915. Sections 1, 18 and 20 are the only parts of this Act that are material here, all the other sections being unimportant matters of detail. The Act is synopsized in Appendix "C" to this brief. The full Act is in the pamphlet laws of the extra session of 1917, page 7. (infra p. 51.)

Section 18 repealed the Act of November 18th, 1915, known as the non-shipping law and also that part of the Act of November 17th, 1915, contained in the following words:

"But this inhibition does not include and nothing in this Act shall affect the social serving of such liquors and beverages in private residences in ordinary social intercourse."

Section 20 provided for the summary destruction by the Sheriff of any apparatus used or intended to be used in the manufacture of such liquors; and that any vehicle and vessels used in the transportation thereof should be proceeded against **in rem** by way of securing a judgment of condemnation.

The 18th Amendment of the Constitution was proposed by the Congress after the foregoing laws became effective, was ratified in 1919, and became effective in January, 1920, and the Volstead Act was passed in October, 1919. This Act prohibits the manufacture, sale, importation, exportation, and transportation. It also prohibits possession, except in one's own home for the use of himself, his family and his guests.

It is believed that the foregoing summary of the various Georgia laws and reference to related federal laws will be sufficient to fully advise the Court as to the legislation pertinent to the subject, especially if reference be made to the Appendices.

IV.

ARGUMENT AND BRIEF.

1. An Important Preliminary Question.

At the very threshold of the inquiry, it may well be doubted whether the prohibition against possession as contained in the Act of 1917, which is the only statutory authority relied on by the Sheriff, or that can be relied on, was ever intended to apply to liquors already in possession.

If it be borne in mind that the Act of November 18, 1915, was passed for the purpose of exercising the power that resulted from the Webb-Kenyon Act to regulate interstate shipments, and that it did so by expressly and affirmatively permitting and authorizing such purchases and shipments, and then observe that the Act of 1917 expressly repealed that of November 18, 1915, and substituted a policy of totally prohibiting them, the judicial mind might well shrink from assuming that the legislature of Georgia would intentionally make it penal for a citizen to have and possess property which the legislature had so short a time before affirmatively authorized its citizens to buy. Such a purpose on the part of the State might not, indeed, shock the conscience of just men, but it would certainly be so startling as to warrant the judicial mind in refusing to believe that such a thing was intended, unless the

purpose was expressed in terms so clear and unambiguous as to leave no room for doubt.

Now when we turn to the language used we find these facts:

1. The title or preamble of the Act declared its purpose to be, **inter alia,**

> "to make it unlawful to transport, ship, or deliver in this state, whether from without or within the state, any spirituous, vinous, malt, or other intoxicating liquors or beverages, (except . . ., etc.); to make it unlawful to have, receive, **possess** or control any **such** liquors, (. . . ., etc.); to repeal the Act of November 18, 1915," etc.

By all the elementary rules of construction, penal statutes are construed as speaking only for the future; and, if the title of this statute had not contained the word **"such,"** it would still, upon all just principles, be almost necessary to interpret this prohibition against "having" or "possessing" as referring only to liquors transported thereafter in violation of the policy declared by the Act; and certainly as not intending to penalize the citizen for possessing what the law had previously given him affirmative permission to acquire. When the word "such" is noted, it seems to us that the meaning is no longer a mere matter of presumption, but that the unequivocal language of the statute necessarily forbids any other interpretation and makes it mandatory to read it as referring only to after acquired liquors.

2. Turning now to the Act itself, we read in Section 1, as follows:

> "**From and after the passage of this Act** it shall be unlawful for any common carrier . . . to transport, ship or carry . . . for personal use or otherwise, any spirituous . . . liquors, or any of the prohibited liquors or beverages, as are defined in the Act approved November 17, 1915, . . . It shall be unlawful for any . . . person . . . to receive from any common carrier, . . . or to have, control, or **possess**, in this state, any of **said** enumerated liquors or beverages," etc.

The reference to the definition in the Act of November 17, 1915, does not, we think, in any way militate against the argument here made. That definition was merely an enumeration of the different kinds of liquids that were to be included in the term "prohibited liquors and beverages." The Act quoted shows on its face that the "said" enumerated liquors referred only to those which might thereafter be unlawfully transported.

It seems to us therefore entirely clear that the Act relied on by the Sheriff as his authority does not forbid the possession of these liquors. If so, the Sheriff has proceeded to seize property without any warrant of law, and it follows that the injunction should issue on the ground that the Federal Constitution is violated. If this is true, the Supreme Court of Georgia erred as alleged in the first assignment.

The fact that the liquors now in question were not bought after 1915 and were, therefore, not of the sort that it had been expressly permitted to buy, does not militate against the force of the foregoing argument. For what we have been endeavoring to show is that the prohibition against possession, in the Act of 1917, was intended to apply only to liquors bought even after that date. In so doing the argument is that it would be a monstrous injustice to apply it to the liquors bought after 1915 by affirmative permission of the State. But if it does not speak for the future only, it speaks for **all** past acquired liquors; if it applies to liquors bought by the tacit permission of the State before 1915, it would by the same logic apply to those bought after 1915 by express permission; if, on the other hand, it applies to **some** past acquired liquor, it applies to **all** past liquor.

We do not, however, press this point, because, however clear it may seem to us, the Georgia Court appears to have construed the prohibition against possession as applicable to all liquors, no matter when acquired or how lawful the possession may have been originally. This being the construction put on the Georgia law by the Georgia Court, we assume that this Court will feel bound to follow that construction. If so, the Georgia Court has held that the legislature may, without process or compensation, confiscate property that was not only lawfully acquired but acquired pursuant to express legislative permission. And this makes a very narrow

issue, and, as we think, advances a startling proposition of law.

2. Is the Law Ex Post Facto?

We have already, on page 9, referred briefly to this subject and have not concealed the apprehension that this question admits of doubt. We think, however, that when the substance of the Act is considered rather than its form, the objection made is well taken. We recognize the soundness of the doctrine announced in the 5th division of the case of **Waters-Pierce Oil Co. vs. Texas,** 212 U. S. 86, and in **Chicago & Alton R. R. Co. vs. Tranbarger,** 238 U. S., 67. But in the first of these the statute forbade the doing of an affirmative act and spoke solely for the future. In the other the statute **was construed as commanding an affirmative act** and penalizing refusal, this act also speaking only for the future. The things that were past were neither directly nor indirectly prohibited. In the case now considered the statute complained of, as construed by the Sheriff, does not prohibit any future act or command any future act. If it applies to these previously acquired liquors, as the Sheriff claims, it would be violated by plaintiff not by doing a prohibited act or by refusing to do what is commanded, but merely by doing nothing. In legal effect it punishes plaintiff merely for the consequences of what he did before the law was passed, **and for nothing else.**

We want to be candid. We recognize the possibility that this reasoning may, if not carefully analyzed,

be regarded as a species of casuistry. But we believe it is sound and based on sound logic. It may be said that in **Tranbarger's** case also, the Railroad was merely passive. But this is more apparent than real. The statute of Missouri commanded an affirmative act, viz.: the opening of the drains, and penalized the refusal. The act we complain of does not do this. It penalizes mere passivity. The lawful purchase had resulted in a condition; to-wit, a physical possession that was lawful when acquired. The statute punishes that.

A more nearly analogous case would have existed if the State had enacted that, in any case where a citizen should have come into the lawful ownership and possession of liquor, he should destroy it or give it up to the State, and that, failing to do so, he should be guilty. But if that had been the formula actually expressed in words by the statute, as it was in substance, the grave conflict between the law and the Constitution would have been so apparent, we imagine, as to leave no doubt that it was a taking for public use without compensation,—a thing abhorrent to our ideas of justice, as well as to the Constitution.

Or suppose the State of Missouri without any command to do an act, had enacted that in cases where a railroad company already had an embankment that was improperly drained, it should be guilty of a misdemeanor. Would not this be punishing the company for its prior act of constructing the embank-

ment? And if so, how does it differ from the case now considered?

When the State of Georgia makes it a misdemeanor merely to possess liquor, is this not punishing the citizen for having acquired the possession?

In all cases where authority is sought for a legal proposition, a lawyer finds himself tempted to rely too much on some generalization in the language of a Court. If we are not making that mistake here, we might say that this Court has decided the question in our favor in this language:

> "It may be said, generally speaking, that an **ex post facto** law is one which . . . in relation to an offense, **or its consequences,** alters the situation of a party to his disadvantage." (**Duncan vs. Missouri,** 152 U. S., 382.)

And yet this is what has happened in the case at bar, and is exactly what we contend renders the Act unconstitutional.

Calder vs. Bull, 3 Dal., 386, was a case involving civil or property rights and therefore, of course, had no direct relation to the constitutional prohibition in question. Indeed it was so decided. And yet this Court availed itself of the analogy to engage in a discussion of **ex post facto** laws that has made it one of the leading cases on the subject, and its classification of such laws has been frequently cited. Whether the broad language of Mr. Justice Chase

as to the invalidity of statutes that conflict with fundamental rights was warranted, or whether we should follow the more cautious deliverance of Mr. Justice Iredell, the judges were agreed as to the principles of **ex post facto** legislation. And all agreed that it is not competent to "violate the right of an antecedent private contract, or the right of private property" (page 388), and we feel confident that the present case falls within this statement:

> "The plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several States shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it."

The case of **Cummings vs. Missouri**, 71 U. S., (4 Wall.) 277, is not exactly like the case at bar, but it presents many points of similarity. In the present case nobody would contend that the legislature of 1917 could directly penalize the previous purchase of the liquor, but that was what it did in substance and effect when it made the possession a crime. In **Cummings'** case the Missouri legislature of 1865 did not attempt, in terms, to penalize the priest's actions during the war, but it required him to take an oath that he had not done such and such acts during that period, or give up his office. The act did not penalize his mere failure to take the oath, **but penalized his active discharge of his priestly functions** without taking the oath. The present case is stronger, for plaintiff has not been prohibited from doing any act,

but he has been penalized for passive tolerance of an existing status.

In Cummings' case the legislative edict was really and in substance seeking to punish him for a previous lawful act. At least that was the effect of it. The same thing is true here. The law of 1917, in effect, punishes him for buying the liquor and taking it into his house, although in form it merely punishes him for the resultant fact of its being there.

How very pertinent here is the language of Mr. Justice Field, delivering the opinion of the Court:

> "The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

And so while the Georgia law of 1795 that was considered in **Fletcher vs. Peck,** 6 Cr., 137, dealt with property rights only, the Court said of it in the Cummings case:

> "In **Fletcher vs. Peck,** 6 Cranch, 87, Mr. Chief Justice Marshall defined an **ex post facto** law to be one 'which renders an act punishable in a

manner in which it was not punishable when it was committed.' 'Such a law,' said that eminent judge, 'may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime, which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds the estate? The Court can perceive no sufficient ground for making this distinction. This rescinding act will have the effect of an **ex post facto** law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This can not be effected in the form of an **ex post facto** law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

The act to which reference was here made was passed by the State of Georgia, rescinding a previous act, under which lands had been granted. The rescinding act annulling the title of the grantees, did not, in terms, define any crimes, or inflict any punishment, or direct any judicial proceedings; yet, inasmuch as the legislature was forbidden from passing any law by which a man's estate could be seized for crime, which was not declared such by some previous law rendering him liable to that punishment, the **Chief Justice** was of the opinion that the "re-

scinding act had the effect of an **ex post facto** law, and was within the constitutional prohibition.

This particular phase of the question would perhaps be more pertinent under the next division of this argument, dealing with the deprivation of property, but the intimate connection between **ex post facto** laws, laws impairing the obligation of contracts, and laws depriving one of his property without due process of law, makes it difficult to draw a sharp line between them, and the language last quoted is singularly apposite here.

We can not doubt that the act of 1917 was, in substance and effect, an **ex post facto** law.

3. **Due Process of Law.**

It seems to us that the one great principle undeniably violated by the Act of 1917 as construed by the Sheriff, is involved in the claim that the provision as to possession deprives plaintiff in error of his property without due process of law.

The cases of **Delaney vs. Plunkett,** 146 Ga., 547, and **Barbour vs. the State,** 146 Ga., 667, decided a question of this same general character against our present contention, and the Barbour case was affirmed by this Court. **(Barbour vs. Georgia,** 249 U. S., 454.)

That this ruling does not conclude us, however, is perfectly apparent from the fact that this Court expressly planted its decision on the circumstance that Barbour had acquired the liquor after the en-

actment of Nov. 18, 1915, though before its effective date. Indeed this Court construed the Georgia decision as proceeding on that ground only. In some of the language used by the Georgia Court **arguendo**, there was the suggestion of a possible intention on the part of that Court to go further, but that is all that was decided on the subject by this Court.

It will not be overlooked that the Georgia Court was divided on the subject, and it is particularly worthy of note that those cases were predicated only on the act of Nov. 18, 1915. There are some suggestions in the two cases (Delaney's case and Barbour's), as to a possible difference in possession generally and possession in excessive quantities, or in particular sorts of containers. It is not necessary for us to discuss that question here or waste time over the inquiry as to whether such a distinction is or is not fine spun, because the Act of Nov. 18, 1915, was the only law that made such a distinction, and that Act, which was itself passed after the property was acquired, was entirely repealed by the Act of 1917, five years before this case arose.

It is true that the Act of Nov. 17, 1915, is still of force and that Section 20 of that Act provided for the seizure and destruction of liquors when kept in quantities particularly forbidden, but the repealed law of Nov. 18, 1915, was the only law that dealt with the question of quantity, and it is certain, from the record, that the liquor now in question was not only acquired "without any violation or evasion of the

laws of Georgia," and was not "in any way unlawfully procured," etc., **(see transcript, page 18, paragraph 9)** but it is equally certain that the liquors were never kept in any unlawful way, at any prohibited place, or for any prohibited purpose **(same page and paragraph of transcript and also page 19, paragraph 10).**

Considering the question upon a basis of a priori logic, we apprehend that it would never be questioned, here or anywhere else, that a flat prohibition as to the possession of ordinary property, without any provision as to compensation to the owner, would fall within the Constitutional inhibition now considered.

If, then, a different rule is to obtain as to this class of property, it must be asked and answered why such a difference would exist.

On page 550 of the 146th Ga., in the Delaney case the Court says that laws prohibiting the sale are upheld on the ground that such sales are against the public interest, and that the business if not inherently evil, is a constant menace to peace and good order.

We venture to doubt the logical soundness of this sort of reasoning. It seems to us to involve a confusion in thought as to the relative functions of the legislative and judicial powers. We have never doubted or questioned and we do not doubt or question now, the power of the legislature to prohibit either sale or possession of any class of property

which it deems inimical to the public welfare. But we can not bring ourselves to think that it is within the judicial powers to approve, any more than it can disapprove, the legislative judgment that it is inimical. The Courts do not sustain such laws because they consider the property noxious, but because **the legislature** so considers it.

So long as no specific guaranty of the Constitution is violated we admit and believe that the police power of the legislature in such matters is not limited. So long as it speaks for the future, in our creed there is nothing to do but to obey. But when property has been recognized for all time as a legitimate subject for ownership, and the legislature determines that its mere possession is inimical to the public interest, and orders its destruction merely on account of its real or supposed inherently evil quality, and makes the edict applicable to property already acquired, we think it is not a question open to discussion that the rights of the owner are violated. On page 556 of the Delaney case the Court said,

> "With the wisdom of the exercise of that judgment the Court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it can not be said that the limit of the legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system."

The writer of this brief can not reconcile the argu-

ment of the Court with this dictum. He, too, thinks that the Courts have no concern with the wisdom of the legislative judgment. It seems to him also that the judicial opinion has and should have nothing to do with the expediency of the legislative policy or with the reasons on which it is based. To his mind the only question is, does the policy violate the express prohibition of the Constitution?

The only answer the Georgia Court makes to this view amounts in substance and effect to this:

> "We would not allow the legislature to deprive a citizen of any property that we considered harmless to the public, but if our judgment so condemns the evil character of the property as to agree with the legislative policy, they may confiscate it at pleasure and we will not interfere."

This may be a frank and even brutal paraphrase of the Court's logic, but it is exactly what it amounts to, and it does the very thing the Court disclaims its own authority to do. It passes judgment, not on the Constitution, but on the wisdom and justice of the law and the soundness of the public policy formulated.

If the Constitution is to be construed one way as to bread, or horses, or automobiles, and another way as to whiskey, where shall the line be drawn?

The legislature might prohibit the sale of olemargarine. We think it would not raise a judicial ques-

tion. It might go further and prohibit the possession of it, but could it make that prohibition apply to oleomargarine already lawfully acquired?

It might prohibit the brewing of beer. Could it confiscate the brewery?

In Georgia, at present, there is an earnest demand for a prohibition against the keeping of pool and billiard rooms. If such a law is passed we think the Courts could not nullify it as being unwise or unjust. But suppose the prohibition extended to the mere possession of the tables already owned. Would that be valid?

Or let us come down to tobacco and cigarettes. There are many people who consider these things a menace to the public health. In our opinion, prohibiting their use or sale by law would not open such law to judicial review. But suppose it prohibited the possession of such wares, anywhere and everywhere and for all purposes, and made the prohibition applicable to stocks on hand.

It is useless to multiply illustrations. If we once admit that the Courts are to uphold these laws only when their judgment approves the legislative policy, or on any logic that uses such approval as a minor premise, we must also admit that they can nullify them when their judgment disapproves the policy.

We see no escape from the conclusion, based on a **priori** reasoning, that the law of 1917, as interpreted

by the Sheriff and upheld by the Supreme Court of Georgia, deprives Mr. Samuels of his property without due process of law.

Upon authority we cite this Court to what was said in Bartemeyer's case in 18 Wall., 129.

The exact question has never been passed on here as to intoxicating liquors. It was raised in **Boston Beer Co. vs. Mass.**, 97 U. S., 33; in **Barbour vs. Georgia.**, 249 U. S., 454, and in **Eberle vs. Michigan**, 232 U. S., 700. In all these cases the decision proceeded upon other grounds.

But in **Bartemeyer's** case this Court said,

> "but if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this Court."

And so in the **Boston Beer** case this Court said,

> "We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we in-

fer that the liquor in this case, as in the case of Bartemeyer vs. Iowa, 18 Wall., 129, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken."

In **Barbour's** case this Court said,

"Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in Bartemeyer vs. Iowa, 18 Wall., 129, and Boston Beer Co. vs. Massachusetts, 97 U. S., 25, 32 and 33, but was not decided. The question presented here, however, is simpler, for the exact date when Barbour acquired the liquor is not shown, and we must assume, **as the Supreme Court of Georgia did** (black type ours), that it was acquired during the period of five months and twelve days between the enactment of the law and the date when it became effective. Does the fourteenth amendment, by its guaranty to property, prevent a state from protecting its citizens from liquor so acquired?"

At most these extracts do not decide the question. But the questions suggested by them seem to us answerable in but one way. We hope and believe that the record in this case is in such shape as to bring them within this dictum in Bartemeyer's case.

"Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration. They are not to be lightly treated, nor are we

authorized to make any advances to meet them until we are required to do so by the duties of our position."

4. The Fifth Assignment.

Aside from all that has been thus far argued, it remains to be considered that the Sheriff who had seized these liquors, was proposing to destroy them without any warrant or judgment and without any hearing whatever. Complaint was distinctly made to the trial court on this subject in paragraph 17 of the original petition **(transcript, page 20).**

There was no other way in which plaintiff in error could assert his right to notice, hearing, and judgment, and the Superior Court of DeKalb County, by its judgment, withheld the protection thus prayed **(transcript, page 24).**

In his appeal to the Supreme Court of Georgia against this judgment the plaintiff in error clearly assigned this judgment as error in the eighth assignment **(transcript, page 15).**

He now comes here and in the 5th assignment in the present record he says that, in affirming the judgment of the Court below, the Supreme Court of Georgia necessarily ruled that a Sheriff may seize and destroy the property of a citizen without any accusation or pleading, without any hearing from him, and without a judgment.

There is no law in Georgia conferring such sum-

mary power on the Sheriff. There could not be such a law. Section 20 of the Act of Nov. 17, 1915, declares the liquors prohibited in that Act to be contraband and provides for their destruction after a hearing and judgment. Unless they can be destroyed as there provided, there is no statutory provision at all for their destruction.

It needs no argument to demonstrate that the hearing must be given, not as a matter of grace but as a matter of right. It is equally axiomatic that the hearing on a prayer for injunction is not a substitute for a hearing in the first instance. An application for injunction is aimed at an unauthorized destruction before a hearing had upon legal process instituted by the Sheriff. Had such a process been taken the owner would have been thereby informed as to the grounds on which his property was to be condemned, would be entitled to be heard, and would have found it necessary only to disprove those allegations of wrong on which the seizure was made. It is no substitute for such a proceeding to hear him come in and set up, in the dark, that there was no ground at all, and negative every possible or conceivable ground. Such a thing puts upon him the unreasonable burden of disproving every possibility, even those that did not exist, or which it might never occur to him could be conjectured.

Whatever, therefore, may be true as to any possibility existing, under which the Sheriff might have a right to proceed; whatever possibility might exist

under which this law of 1917 could be effective; the fact remains that the Sheriff seized the property on his own authority, condemned it on his own judgment, and was proceeding to destroy it without any accusation or pleadings of any sort, and without any hearing at all, and that, in withholding its protection, the Court adjudged that such things were legally possible. We can not believe that this was due process.

Respectfully submitted,

Hooper Alexander

For Plaintiff-in-Error.

APPENDIX "A"

Being a synopsis of the Georgia Act of November 17, 1915, with full quotation of all material provisions.

As indicated in the body of the brief, the law of 1907 contained in Section 426 of the Penal Code (ante page 13), had not proven entirely satisfactory, and in 1915 an extraordinary session of the legislature was called to enact such laws as would provide for its adequate enforcement and effectually prohibit the manufacture and sale within the bounds of the State (ante page 14).

The Act of November 17th was completely synopsized in a very long title. It indicated no thought or purpose to go further in principle than the Act of 1907, though it added a number of detailed provisions manifestly intended to prevent evasions of that law.

Section 1 of this Act painstakingly defined the liquors and beverages that were affected by this or any other law on the same subject, and is not otherwise here important.

Section 2 is sufficiently important and material to set out here practically in full:

> "It shall be unlawful for any person . . . to manufacture, sell, offer for sale, **keep on hand at a place of business or at or in any social, fraternal, or locker club,** or otherwise dispose of any of the prohibited liquors and beverages described in Section 1 of this Act, or any of them in any quantity; **but this inhibition does not include, and nothing in this Act shall affect, the social serving of such liquors and beverages in private residences in ordinary social intercourse."**

Section 3 affirmatively prohibited counties and municipalities from licensing sales or dealings in any prohibited liquors, **"including imitations of or substitutes therefor."**

Section 4 was quite long and evidently auxiliary. It prohibited the keeping of certain places, evidently because they would lead to evasions of the principal prohibition, and provided for their abatement by injunction as nuisances.

Section 5 operated on the owners of premises rented to persons for violations of the law.

Section 6 authorized landlords to forfeit leases where the premises were used for violating the principal prohibitions.

Section 7 was as follows:

> "That the keeping of the liquors or beverages or any of them, mentioned in Section 1 of this Act in any building not exclusively used for a dwelling, shall be prima facie evidence that they are kept for sale or with intent to dispose of same contrary to the law."

Section 8 made it prima facie evidence of a sale, to deliver any of such liquors from any of a large number of places, including **"any dwelling house or dependency thereof, if any part of the same is used as a public eating house, grocery store, or other place of common resort."**

Section 9 defined divers places as common nuisances wherein such prohibited liquors are manufactured, sold or kept for sale, or otherwise disposed of to be drunk on or near the premises and the like.

Section 10 made it prima facie evidence of violation for any person to have or apply for a license from the United States.

Section 11 prohibited the keeping of any warehouse or other place of storage where the prohibited liquors are kept or stored for another.

Section 12 prohibited any immunity from testifying on the ground of self crimination.

Section 13 enlarged this denial of immunity by permitting general and searching inquiry by the Grand Jury.

Section 14 required special charges to all Grand Juries on the subject.

Section 15 merely added other details in the way of denying immunity from giving testimony.

Section 16 required all Sheriffs to procure lists monthly

of all persons holding United States revenue licenses or tax stamps, and to advertise them.

Section 17 required the Sheriffs to furnish this information to prosecuting officers and defined their duties in such cases.

Section 19 prescribed a rule of evidence for determining whether a given liquid was embraced within those defined in Section 1.

Section 18 further defined the duties of prosecuting officers in the premises.

Section 20 was as follows:

> "That no property rights of any kind shall exist in said prohibited liquors and beverages, or in the vessels kept or used for the purpose of violating any provision of this Act or any law, for the promotion of temperance or for the suppression of the evils of intemperance; nor in any such liquors when received, possessed or stored at any forbidden place or anywhere in a quantity forbidden by law, or when kept, stored or deposited in any place in this State for the purpose of sale or unlawful disposition or unlawful furnishing or distribution; and in all such cases the liquors and beverages, and the vessels and receptacles in which such liquors are contained, and the property herein named, kept or used for the purposes of violating the law as aforesaid, are hereby declared to be contraband and are to be forfeited to the State when seized, and may be ordered and condemned to be destroyed after seizure by order of the court that has acquired jurisdiction over the same, or by order of the judge or court after conviction when such liquors and such property named have been seized for use as evidence."

Section 21 provided that the invalidity of any one section of the law should not be held to invalidate the others.

Section 22 provided that no repeal of any other law resulting from the Act should affect pending actions civil or criminal.

Section 23 related to penalties.

Section 24 provided that the law of 1907 embraced in section 426 of the Penal Code should not be deemed to be repealed.

Section 25 provided that the Act should take effect May 1, 1916.

Section 26 repealed conflicting laws.

It is confidently submitted that even if the liquors now in question had been bought after the enactment of this law, no violation of it could be here complained of. On the contrary it affirmatively recognized the correctness of our present contentions.

APPENDIX "B."

Being a synopsis of the Georgia Act of November 18, 1915, with full quotation of all material provisions.

This Act was manifestly intended to make effective in Georgia the provisions of the Webb-Kenyon Law. No question was made in the Court below and none is made here as to the power of the Legislature to enact this law, though it might well be questioned whether such power existed in view of the provisions of the Georgia Constitution, Art. 5, Sec. 1, Para. 13, (Code section 6482) which prohibits the enactment of any law except such as relate to the object stated in the convening proclamation. That question, however, is purely academic.

The title of this act also was a complete synopsis of the provisions of the law itself. Like the body of the act it dealt solely with the matter of interstate transportation and provided a complete code of regulation on that subject.

Section 1 prohibited transportation of intoxicants into Georgia or their delivery here by any common carrier when intended **"to be received, possessed, sold or in any manner used . . . in violation of any law of this State now in force or of this Act, or that may be hereafter enacted."**

Section 2 defined what deliveries would be regarded as unlawful.

Section 3 prohibited the use of fictitious names or the names of other persons in making orders.

Section 4 was for the same general purpose as Section 3 in preventing evasions.

Section 5 was similar.

Section 6 was as follows:

> "That since it is the general policy of this State to require, under nonprohibited conditions and in nonprohibited quantities, the liquors mentioned in Section 1 of this Act to be delivered to and possessed by individuals only, and for personal and domestic consumption, therefore it is hereby made unlawful to deliver

any of the said liquors to or for account of any firm, partnership, corporation or association or persons, or for any person for or on account of the same, to receive or possess any of said liquors and the beverages. This section does not apply to alcohol when received or possessed according to law."

Section 7 made elaborate provisions as to precautions against improper deliveries by the carrier or deliveries to the wrong person.

Section 8 was as follows:

"That consignee of the liquors mentioned in the preceding section, and in Section 1 of this Act, when to be received or delivered in nonprohibited quantities, may after making and signing affidavit and giving receipt for, **transport or carry liquors to a place where it is not unlawful to receive, have or possess the same.**

Section 9 prohibited the selling or transferring of any bill of lading or similar indicia of ownership.

Section 10 required written reports by the carriers to the Ordinary, showing all deliveries, and provided for the enforcement of this duty.

Section 11 related to the preservation and use of these reports and their inspection by the public.

Section 12 related to the duty of the carriers to keep records.

Section 13 related to the privilege to inspect these records.

Section 14 prohibited banks under certain conditions from making collections for shipments.

Section 15 prohibited the division of packages on the premises of the carrier.

Section 16 was as follows:

"That it shall be unlawful for any person to receive, accept delivery of, possess or have in possession at one time, or within any period of thirty consecu-

tive days, whether in one or more places, or whether in original packages, or otherwise, (1) more than one gallon of vinous liquor, or (2) more than six gallons (48 pints) of malted liquors or fermented liquors, such as beer, lager beer, ale, porter or other similar fermented or intoxicating or spirituous liquors either in bottles or other receptacles, or (3) more than two quarts of spirituous liquors or other intoxicating liquors, or other prohibited liquors beyond those named in sub-divisions one and two above.

"But this section shall not apply to the receipt or possession of alcohol by persons who are permitted by law to possess, receive, sell or use the same, when received, possessed or sold in accordance with the rules and regulations prescribed by law."

Section 17 was as follows:

"That any of the following facts shall constitute prima facie evidence that the liquors mentioned in the subdivisions of this section respectively are kept for sale contrary to law, to-wit: (1) The possession, at any one time or within the period of thirty days of more than one gallon of vinous liquors whether in one or more places; (2) or the possession at one time, or within a period of thirty days of more than six gallons (48 pints) of malted liquors or fermented liquors, such as beer, lager beer, ale, porter or other similar fermented or intoxicating or spirituous liquors either in bottles or other receptacles, whether in one or more places, or (3) the possession at one time or within a period of thirty days of more than two quarts of spirituous liquors, or other intoxicating liquors or other prohibited liquors named in sub-divisions one and two above, whether in one or more places; (4) the delivery to a person, firm, corporation or any officer, agent or servant of any of them, at one time, or within a period of thirty days, whether in one or more places, of (a) more than one gallon of vinous liquors, or (b) more than six gallons (48 pints) of malted liquors, or fermented liquors, such as beer, lager beer, ale, porter or other similar fermented intoxicating or spirituous liquors either in bottles or

other receptacles; or (c) more than two quarts of spirituous or other intoxicating liquors, or other prohibited liquors beyond those named in sub-divisions (a) and (b) above.

"(1) But this section does not apply to the receipt or possession of alcohol by persons who are permitted by law to possess, receive, sell or use the same, when received, possessed or sold in accordance with the rules and regulations prescribed by law."
Section 18 was as follows:

"That when **more than one quart** of the liquors mentioned in Section 1 of this Act or prohibited liquors is received or had in possession it must be in bottles or receptacles of a capacity of **not less than one quart,** and when a quart or less is so received, or possessed it must be contained in one receptacle or bottle. Failure to observe the provisions of either of them shall constitute prima facie evidence that said **liquors are kept or had in possession** for sale or other unlawful disposition; and it shall be unlawful to receive or possess the liquors in quantities mentioned in receptacles or bottles that do not conform to the above requirements; but this section shall not apply to malted or similar fermented liquors such as beer, lager beer or porter or ale."

Section 19 prohibited carriers and others from accepting such articles from another for transportation for illegal purposes.

Section 20 required the Act construed in harmony with federal statutes relating to interstate transportation or intoxicating liquors.

Section 21 required carriers to permit their records inspected by State officers.

Section 22 related to the venue of prosecutions for transportation.

Section 23 related to immunity from testifying.

Section 24 related especially to alcohol only.

Section 25 related to the venue of investigations by Grand Juries.

Section 26 made it not necessary to negative exceptions in drawing indictments.

Section 27 stated that the invalidity of one section of the law was not to invalidate others.

Section 28 authorizes injunctions against violations of the law.

Section 29 provides penalties.

Section 30 stated the Act to be effective May 1, 1916.

Section 31 repeals conflicting laws.

We submit with confidence, if this Court should feel warranted in construing this law, that it had no application to any other liquors than those shipped under its authority.

This Act was entirely repealed in 1917.

APPENDIX "C."

Being a synopsis of the Act of March 28, 1917, with full quotation of all material provisions.

Like the other two, the title of this act contained a synopsis of its provisions. Under it the present case arises.

Section 1 was a sweeping prohibition against the transportation of liquors by carriers and added the following against other persons:

> "It shall be unlawful for any corporation, firm, person or individual to receive from any common carrier, corporation, firm, person or individual or to have, control, **or possess**, in this state, any of said enumerated liquors or beverages whether intended for personal use or otherwise, save as is hereinafter excepted."

Section 2 disclaimed any purpose to affect the shipping or possession of pure alcohol under existing laws except as provided in Section 3.

Section 3 prescribed at length minute rules as to how pure alcohol could be obtained. It is entirely irrelevant to the present issue.

Sections 4 to 12 inclusive merely added other regulations as to pure alcohol and are entirely irrelevant here.

Sections 13 and 14 provided regulations as to obtaining sacramental wines.

Section 15 made it compulsory on persons implicated in illegal transactions to testify against their associates and granted immunity in such cases.

Section 16 provided penalties.

Section 17 established a rule as to prima facie evidence in the prosecution of carriers.

Section 18 was as follows.

"Be it further enacted by the authority aforesaid,

That the act approved November 18, 1915, and known as the non-shipping law, found on pages 90 et seq. of the Acts of 1915, extraordinary session, be and the same is expressly repealed, provided that this shall not be construed to affect either directly or indirectly nor save from prosecution for offenses committed heretofore under the Act. The latter part of Section 2 of the Act approved November 17, 1915, extraordinary session, found on page 80, and reading as follows: "But this inhibition does not include and nothing in this Act shall affect the social serving of such liquors and beverages in private residences in ordinary social intercourse," is expressly repealed. The Act approved August 19, 1916, found on pages 72 et seq. of said acts of 1916, regulating the importation of alcohol is also expressly repealed.

Section 19 made an exception as to shipping or receiving denatured alcohol usable only for scientific or mechanical purposes.

Section 20 was as follows:

"Be it further enacted by the authority aforesaid, That all apparatus or appliances which are used for the purpose of distilling or manufacturing any of the liquors or beverages specified in this Act are hereby declared to be contraband, and no corporation, firm or individual shall have any property right in or to the same, and whenever said apparatus or appliances so used or are about to be used for the purpose of manufacturing, using, holding or containing any of the liquors or beverages specified in this Act are found or discovered by any Sheriff, deputy sheriff or other executing officer of this State, the same shall be summarily destroyed and rendered useless by him without any formal order of the court. All vehicles and conveyances of every kind and description which are used on any of the public roads or private ways of this State, and all boats and vessels of every kind and description which are used in any of the waters of this State in conveying any liquors or beverages, the sale or possession of which is prohibited by law, shall be seized by any sheriff or other arresting officer,

who shall report the same to the solicitor of the county, city or superior court having jurisdiction in the county where the seizure was made, whose duty it shall be within ten days from the time he received said notice to institute condemnation proceedings in said court by petition, a copy of which shall be served upon the owner or lessee if known, and if the owner or lessee is unknown notice of such proceedings shall be published once a week for two weeks in the newspaper in which the sheriff's advertisements are published. If no defense is filed within thirty days from the filing of the petition, judgment by default shall be entered by the court at chambers, otherwise the case shall proceed as other civil cases in said court. Should it appear upon the trial of the case that said vehicle, conveyance, boat or vessel was so used with the knowledge of the owner or lessee, the same shall be sold by order of the court after such advertisement as the court may direct.

Section 21 provided a special item of costs for the benefit of the arresting officer in cases of manufacturing liquors.

Section 22 prohibited owners of premises allowing others to locate apparatus for distilling on such premises.

Section 23 provided a special penalty for manufacturing liquors.

Section 24 was a general repealing clause.

It is presumed that the sheriff based his action on the general prohibition contained in section 2 against possession. The material part of this section is set out in the foregoing summary.

SAMUELS *v.* McCURDY, SHERIFF OF DEKALB COUNTY, GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 225. Argued January 22, 1925.—Decided March 2, 1925.

1. A State law (Georgia Ls. 1917, Ex. Sess.) making it unlawful for a person to possess intoxicating liquors which, previously to its enactment, he had lawfully acquired for consumption as a beverage in his home, and subjecting them to seizure and destruction, is not an *ex post facto* law. P. 193.
2. The seizure and destruction, without compensation, of such liquors, pursuant to the State prohibition laws, does not deprive such possessor of property without due process of law. P. 194.
3. When a State law denied property rights in intoxicating liquors, and made their possession unlawful, except for medicinal and other specified uses under special permit, and provided for seizure under search warrant, and for destruction by an order of court to be made without first hearing the person from whom they were taken; *held*, that the denial of such hearing did not render the law invalid under the due process clause of the Fourteenth Amendment, as applied to one who did not claim to be within the statutory exceptions and whose contention that the law violated his constitutional property rights in liquors seized under it was heard in a suit brought by himself to enjoin their destruction and regain possession. P. 199.

157 Ga. 488, affirmed.

ERROR to a judgment of the Supreme Court of Georgia which affirmed a judgment dismissing a suit brought by the plaintiff in error to enjoin the defendant in error, a sheriff, from destroying intoxicating liquors pursuant to an order of court, and for specific recovery of the liquors.

Mr. Hooper Alexander for plaintiff in error.[1]

It may well be doubted whether the prohibition against possession, as contained in the Act of 1917, was ever intended to apply to liquors already in possession.

[1] Defendant in error submitted on the printed record.

Is the law *ex post facto*? When the substance of the act is considered, the objection is well taken. We recognize the soundness of the doctrine announced in *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, and *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67. In the case now considered the statute, if it applies to these previously acquired liquors, would be violated by plaintiff, not by doing a prohibited act or by refusing to do what is commanded, but merely by doing nothing.

It may be said that in *Tranbarger's Case* also, the railroad was merely passive. But this is more apparent than real. The statute of Missouri commanded an affirmative act, viz., the opening of the drains, and penalized the refusal. The act we complain of does not do this. It penalizes mere passivity. The lawful purchase had resulted in a condition, to-wit, a physical possession that was lawful when acquired. The statute punishes that. When the State of Georgia makes it a misdemeanor merely to possess liquor, is this not punishing the citizen for having acquired the possession? See *Duncan* v. *Missouri*, 152 U. S. 382; *Calder* v. *Bull*, 3 Dall. 386; *Cummings* v. *Missouri*, 4 Wall. 277; *Fletcher* v. *Peck*, 6 Cranch 137.

The provision as to possession deprives plaintiff in error of his property without due process of law. *Delaney* v. *Plunkett*, 146 Ga. 547, distinguishing *Barbour* v. *State*, 146 Ga. 667, 249 U. S. 454. See *Bartemeyer's Case*, 18 Wall. 129; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 33; *Barbour* v. *Georgia*, 249 U. S. 454; *Eberle* v. *Michigan*, 232 U. S. 700.

In affirming the judgment of the court below, the Supreme Court of Georgia necessarily ruled that a sheriff may seize and destroy the property of a citizen without any accusation or pleading, without any hearing from him, and without a judgment. There is no law in Georgia conferring such summary power on the sheriff. There could not be. Section 20 of the Act of Nov. 17, 1915,

declares the liquors prohibited in that act to be contraband and provides for their destruction after a hearing and judgment. Unless they can be destroyed as there provided, there is no statutory provision for their destruction.

The hearing must be given, not as a matter of grace but as a matter of right. It is equally axiomatic that the hearing on a prayer for injunction is not a substitute for a hearing in the first instance. An application for injunction is aimed at an unauthorized destruction before a hearing had upon legal process instituted by the sheriff. Had such a process been taken the owner would have been thereby informed as to the grounds on which his property was to be condemned; would be entitled to be heard, and would have found it necessary only to disprove those allegations of wrong on which the seizure was made. It is no substitute for such a proceeding to hear him come in and set up, in the dark, that there was no ground at all, and negative every possible or conceivable ground. Such a thing puts upon him the unreasonable burden of disproving every possibility, even those that did not exist, or which it might never occur to him could be conjectured.

Mr. Chief Justice Taft delivered the opinion of the Court.

Sig Samuels, a resident of DeKalb County, Georgia, filed his petition in the Superior Court of that county against its sheriff, J. A. McCurdy, in which he prayed for the specific recovery of certain intoxicating liquors belonging to him which he averred had been seized on search warrant by the defendant. He asked an injunction to prevent their destruction. A rule to show cause issued and a restraining order. A general demurrer to the petition was sustained and the case dismissed. On error to the Supreme Court of the State, the judgment was affirmed. This is a writ of error to that judgment.

The petition averred that Phillips, a deputy of the defendant, went to Samuels' residence and acting under a search warrant seized and carried away a large quantity of whiskeys, wines, beer, cordials and liquors; that he stored these in the jail of the county; that it was the purpose of the defendant to destroy them, without any hearing of the petitioner; that the value of the liquors, at the scale of prices current before the prohibition laws, was approximately $400, but at the prices paid thereafter, if illegally sold, would be very much more; that the greater part of the liquors was bought by the petitioner and kept at his home prior to the year 1907; that the balance thereof was legally purchased by him in the State of Florida and legally shipped to him in interstate commerce prior to the year 1915; that, although a citizen of the United States and the State of Georgia, the petitioner was born in Europe where the use of such liquors had been common; that he had been accustomed to their use all his life; that he purchased them lawfully for the use of his family and friends at his own home, and not for any unlawful purpose.

The session laws of Georgia for 1907, page 81, now embodied in Section 426 of the Georgia Penal Code, declare that:

"It shall not be lawful for any person within the limits of this State to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or keep or furnish at any other places, or manufacture, or keep on hand at their place of business any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, or other drinks which, if drunk to excess, will produce intoxication; and any person so offending shall be guilty of a misdemeanor."

By Act of November 17, 1915, Section 2, it is provided:

"It shall be unlawful for any person . . . to manufacture, sell, offer for sale, . . . keep on hand at a place

of business or at or in any social, fraternal or locker club, or otherwise dispose of any of the prohibited liquors and beverages described in Section 1 of this Act, or any of them, in any quantity; but this inhibition does not include, and nothing in this Act shall affect, the social serving of such liquors and beverages in private residences in ordinary social intercourse."

Section 20 of same Act reads as follows:

"Sec. 20. Be it further enacted by the authority aforesaid, That no property rights of any kind shall exist in said prohibited liquors and beverages, or in the vessels kept or used for the purpose of violating any provision of this Act or any law for the promotion of temperance or for the suppression of the evils of intemperance; nor in any such liquors when received, possessed or stored at any forbidden place or anywhere in a quantity forbidden by law, or when kept, stored or deposited in any place in this State for the purpose of sale or unlawful disposition or unlawful furnishing or distribution; and in all such cases the liquors and beverages, and the vessels and receptacles in which such liquors are contained, and the property herein named, kept or used for the purpose of violating the law as aforesaid, are hereby declared to be contraband and are to be forfeited to the State when seized, and may be ordered and condemned to be destroyed after seizure by order of the court that has acquired jurisdiction over the same, or by order of the judge or court after conviction when such liquors and such property named have been seized for use as evidence."

By Act of March 28, 1917, it is declared that:

"It shall be unlawful for any corporation, firm, person, or individual to receive from any common carrier, corporation, firm, person or individual or to have, control, or possess, in this State, any of said enumerated liquors or beverages whether intended for personal use or otherwise, save as is hereinafter excepted."

The provision of 1915 which permitted the social serving of liquors and beverages in private residences and in ordinary social intercourse was expressly repealed by the Act of 1917. Under other provisions liquor and wine may be held for medicinal, mechanical and sacramental purposes on special permits. There are not claimed to be any circumstances in this case excepting the liquors here seized from the condemnation of the Act of 1917.

Three grounds are urged for reversal. First, the 1917 law under which liquor lawfully acquired can be seized and destroyed is an *ex post facto* law. Second, the law in punishing the owner for possessing liquor he had lawfully acquired before its enactment, deprives him of his property without due process. Third, it violates the due process requirement by the seizure and destruction of the liquor without giving the possessor his day in court.

First. This law is not an *ex post facto* law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law. It is quite the same question as that presented in *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67. There a Missouri statute required railroads to construct water-outlets across their rights of way. The railroad company had constructed a solid embankment twelve years before the passage of the Act. The railroad was penalized for non-compliance with the statute. This Court said:

"The argument that in respect of its penalty feature the statute is invalid as an *ex post facto* law is sufficiently answered by pointing out that plaintiff in error is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act in 1907, but because after that time it maintained the embankment in a manner prohibited by that act."

Second. Does the seizure of this liquor and its destruction deprive the plaintiff in error of his property without due process of law, in violation of the Fourteenth Amendment?

In *Crane* v. *Campbell*, 245 U. S. 304, Crane was arrested for having in his possession a bottle of whiskey for his own use, and not for the purpose of giving away or selling the same to any person. This was under a provision of the statute of Idaho that it should be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors. It was held that the law was within the police power of the State. The Court said:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors, within its borders without violating the guarantees of the Fourteenth Amendment." Citing *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Company* v. *Massachusetts*, 97 U. S. 25, 33; *Mugler* v. *Kansas*, 123 U. S. 623, 662; *Crowley* v. *Christensen*, 137 U. S. 86, 91; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 330, 331.

The Court pointed out that as the State had the power to prohibit, it might adopt such measures as were reasonably appropriate or needful to render exercise of that power effective; and that considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, the Court was unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose, that the right to hold intoxicating liquor for personal use was not one of those fundamental privi-

leges of a citizen of the United States which no State could abridge, and that a contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. It did not appear in that case when the liquor seized had been acquired, but presumably after the prohibitory act.

In *Barbour* v. *Georgia,* 249 U. S. 454, it was held that the Georgia prohibitory law, approved November 18, 1915, but which did not become effective until May 1, 1916, was not invalid under the Fourteenth Amendment when applied to the possession of liquor by one who had acquired it after the approval of the law and before it became effective.

These cases it is said do not apply, because the liquor here was lawfully acquired by Samuels before the Act of 1917 making it unlawful for one to be possessed of liquor in his residence for use of his family and his guests.

In *Mugler* v. *Kansas,* 123 U. S. 623, it appeared that the breweries, the use of which as such was enjoined as a nuisance, and the beer, the sale of which was also enjoined, were owned by Mugler before the Prohibition Act, making both unlawful. In answering the argument that, even if the State might prohibit the use and sale, compensation should be made for them before putting it into effect, to accord with the Fourteenth Amendment, Mr. Justice Harlan, speaking for the Court, said:

"As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not

disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

"It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the

special exigencies of the moment may require'; and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion can not be parted with any more than the power itself.'"

In view of this language and the agreed statement of facts, the decision necessarily was that the sale of beer made and owned before the prohibition law could be punished by that law as a nuisance and that no compensation was necessary, if the legislature deemed this to be necessary for the health and morals of the community.

It is true that a remark in the opinion in *Eberle* v. *Michigan*, 232 U. S. 700, 706, refers to the question as still an open one, and the same reference is made in *Barbour* v. *Georgia*, 249 U. S. 454, 459. In *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, 157, there is a similar reference, though with a suggestive citation to *Mugler* v. *Kansas*. And in *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, after calling attention to this reservation, this Court said:

"It should, however, be noted that, among the judgments affirmed in the *Mugler Case*, was one for violation of the act by selling beer acquired before its enactment (see pp. 625, 627); and that it was assumed without discussion that the same rule applied to the brewery and its product (see p. 669)."

But it was not found necessary to consider the question in the *Jacob Ruppert Case*, because there was no appropriation of property but merely a lessening of value due to permissible restriction imposed upon its use.

The ultimate legislative object of prohibition is to prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. The state has the power to subject those members of society who might indulge in the use of such liquor without injury to themselves to a deprivation of access to liquor in order to remove temptation from those whom

its use would demoralize and to avoid the abuses which follow in its train. Accordingly laws have been enacted by the States, and sustained by this Court, by which it has been made illegal to manufacture liquor for one's own use or for another's, to transport it or to sell it or to give it away to others. The legislature has this power whether it affects liquor lawfully acquired before the prohibition or not. Without compensation it may thus seek to reduce the drinking of liquor. It is obvious that if men are permitted to maintain liquor in their possession, though only for their own consumption, there is danger of its becoming accessible to others. Legislation making possession unlawful is therefore within the police power of the States as a reasonable mode of reducing the evils of drunkenness, as we have seen in the *Crane* and *Barbour* cases. The only question which arises is whether for the shrunken opportunity of the possessor of liquor who acquired it before the law, to use it only for his own consumption, the State must make compensation. By valid laws, his property rights have been so far reduced that it would be difficult to measure their value. That which had the qualities of property has, by successive provisions of law in the interest of all, been losing its qualities as property. For many years, every one who has made or stored liquor has known that it was a kind of property which because of its possible vicious uses might be denied by the State the character and attributes as such; that legislation calculated to suppress its use in the interest of public health and morality was lawful and possible, and this without compensation. Why should compensation be made now for the mere remnant of the original right if nothing was paid for the loss of the right to sell the liquor, give it away or transport it? The necessity for its destruction is claimed under the same police power to be for the public betterment as that which authorized its previous restrictions. It seems to us that this conclusion finds support

in the passage quoted above from the opinion in the *Mugler Case* and its application to the agreed facts, and in *Gardner* v. *Michigan*, 199 U. S. 325, and *Reduction Company* v. *Sanitary Works*, 199 U. S. 306. See also *American Storage Company* v. *Chicago*, 211 U. S. 306, and *Adams* v. *Milwaukee*, 228 U. S. 572, 584; *Lawton* v. *Steele*, 152 U. S. 133, 136; *United States* v. *Pacific Railroad*, 120 U. S. 227, 239. In *Gardner* v. *Michigan* a municipal ordinance was held valid which required the owner to deliver to the agent of the city all garbage with vegetable and animal refuse, although it was shown that it was property of value because it could be advantageously used for the manufacture of commercial fat. It was decided that the police power justified the legislature or its subordinate, the city council, in the interest of the public in removing and destroying the garbage, as a health measure, without compensation.

Finally, it is said that the petitioner here has no day in court provided by the law, and therefore that in this respect the liquors have been taken from him without due process. The Supreme Court of Georgia has held in *Delaney* v. *Plunkett*, 146 Ga. 547, 565, that, under the 20th Section of the Act of November 17, 1915 (Georgia Laws, Extra. Session 1915, p. 77,) quoted above, which declares that no property rights of any kind shall exist in prohibited liquors and beverages, no hearing need be given the possessor of unlawfully held liquors, but that they may be destroyed by order of the court. In the *Plunkett Case* the seizure was of liquor held in excess of an amount permitted by the law of 1915. By the amendment of 1917, as already pointed out, possession even for home use is now forbidden. As in the *Plunkett Case*, the petitioner does not deny that the liquor seized was within the condemnation of the law and that he has no defense to his possession of it except as he asserts a property right protected by the Fourteenth Amendment which we have

found he does not have. As a search warrant issued, the seizure was presumably valid. The law provides for an order of destruction by a Court, but it does not provide for notice to the previous possessor of the liquor and a hearing before the order is made. Under the circumstances, *prima facie*, the liquor existed contrary to law and it was for the possessor to prove the very narrow exceptions under which he could retain it as lawful. If he desired to try the validity of the seizure, or the existence of the exception by which his possession could be made to appear legal, he could resort to suit to obtain possession and to enjoin the destruction under the Georgia law, as he has done in this case. This under the circumstances, it seems to us, constitutes sufficient process of law under the Federal Constitution as respects one in his situation. *Lawton v. Steele*, 152 U. S. 133, 142. What might be necessary, if he were claiming to hold the liquor lawfully for medicinal or some other specially excepted purpose, we need not consider.

The averment in the petition was that the sheriff intended to destroy the liquor. There is no averment in the petition that he did not intend to do this by order of Court upon his application. We must take it for granted on the demurrer, therefore, as against the pleader that the sheriff did not intend to depart from Section 20 of the Act of 1915, and that the question made here is on the validity of that section.

Judgment affirmed.

MR. JUSTICE BUTLER, dissenting.

I cannot agree with the opinion of the Court in this case. Plaintiff in error is a man of temperate habits, long accustomed to use alcoholic liquor as a beverage. He never sold or in any way illegally dealt with intoxicating liquors and has never been accused of so doing. His supply was lawfully acquired years before the passage of the

enactment in question (the Act of March 8, 1917) for the use of himself, his family and friends in his own home, and not for any unlawful purpose. It consisted of spirituous, vinous and malt liquors and, before the passage of the act, was worth about $400. September 21, 1922, a deputy sheriff or constable, in company with a number of other persons, went to the house of plaintiff in error and searched it and seized and carried away his stock of liquor and delivered it to the sheriff. It was his purpose summarily to destroy it. This suit was brought to restrain him.

Plaintiff in error insists that the seizure deprived him of his property in violation of the due process clause of the Fourteenth Amendment. The decisions of this court in *Crane* v. *Campbell*, 245 U. S. 304, and *Barbour* v. *Georgia*, 249 U. S. 454, are not controlling. In the *Crane Case*, the Idaho statute under consideration (c. 11, Session Laws 1915) made it unlawful to have in possession or to transport any intoxicating liquor within a prohibition district in that State. Crane was accused of having in his possession a bottle of whiskey for his own use and benefit, and not for the purpose of giving away or selling the same. The state Supreme Court said: "The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whiskey, or of any intoxicating liquor, other than wine and pure alcohol for the uses above-mentioned is prohibited." 27 Idaho 671, 679. The point was not made that the liquor was lawfully acquired or that it had never been unlawfully sold, transported or held. Presumably, the whiskey was acquired after the act took effect, and it could not be claimed that it had not been sold or transported in violation of law. In the *Barbour Case*, the prosecution was

under Georgia legislation approved November 18, 1915, which did not take effect until May 1, 1916. Barbour was convicted of having more than a gallon of vinous liquor in his possession on June 10, 1916. This Court, following the Supreme Court of Georgia, assumed that the liquor was acquired after the act was passed and before it took effect, and held that Barbour took the liquor with notice that after a day certain its possession, by mere lapse of time, would become a crime. The act of 1907, now section 426 of the Georgia Penal Code, was in force and made it unlawful for any person to sell or barter intoxicating liquors. It did not appear and was not claimed that the liquor had been lawfully acquired by the accused or that it had not been sold, transported or held in violation of law. The precise question here raised was not decided in either of these cases. Each presented facts materially different from those in the present case.

The seizure and destruction cannot be sustained on the ground that the act in question destroyed the value of the liquor. The question of compensation is not involved. That alcoholic liquors are capable of valuable uses is recognized by the whole mass of state and national regulatory and prohibitory laws, as well as by the state legislation in question. The liquors seized were valuable for such private use as was intended by plaintiff in error. The insistence is that the State is without power to seize and destroy a private supply of intoxicating liquor lawfully acquired before the prohibitory legislation and kept in one's house for his own use. Such seizure and destruction can be supported only on the ground that the private possession and use would injure the public. See *Mugler* v. *Kansas*, 123 U. S. 623, 663; *Gardner* v. *Michigan*, 199 U. S. 325, 333.

The enactment does not directly forbid the drinking of intoxicating liquors. The State Supreme Court has not construed it to prevent such private use of intoxicants.

It is aimed at the liquor traffic. See *De Laney* v. *Plunkett*, 146 Ga. 547; *Barbour* v. *State*, 146 Ga. 667; *Bunger* v. *State*, 146 Ga. 672, cited by that court as authority for its decision in this case. Attention has not been called to any legislation which attempts directly to forbid the mere drinking or other private use of such liquors. As against the objection that it would infringe constitutional provisions safeguarding liberty and property, the power of the State to enact and enforce such legislation has not been established. That question is not involved in this case.

Any suggestion that the destruction of such private supply lawfully acquired and held for the use of the owner in his own home is necessary for or has any relation to the suppression of sales or to the regulation of the liquor traffic or to the protection of the public from injury would be fanciful and without foundation. The facts in the case do not permit the application of the doctrine applied in *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204.

To me it seems very plain that, as applied, the law is oppressive and arbitrary, and that the seizure deprived plaintiff in error of his property in violation of the due process clause of the Fourteenth Amendment. I would reverse the judgment of the state court.